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No. _____

In The

Supreme Court of the United States

October Term, 1994

VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Contrary to the United States Environmental Protection Agency's interpretation of its statutory authority to either prohibit or regulate the "discharge of any pollutant" to waters of the United States under Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, the United States Court of Appeals for the Seventh Circuit construed the Clean Water Act to preclude the regulation of discharges of pollutants to waters of the United States that occur through shallow groundwaters when there is a direct, hydrological connection between the point source and nearby waters of the United States.*

The question presented for review is as follows:

> Should the phrase "discharge of any pollutant" used in Sections 301 and 402 of the Clean Water Act, as defined by Section 502(12) and subsequently interpreted by the United States Environmental Protection Agency, be narrowly construed to preclude Clean Water Act jurisdiction over point source discharges of pollutants to surface waters of the United States that occur when pollutants are intentionally discharged from a point source through shallow, hydrologically connected groundwaters to nearby surface waters of the United States?

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* The Village is not seeking review of that portion of the Court of Appeals' decision construing the subsection of the "citizen suit" statute in the Clean Air Act, 42 U.S.C. § 7604(a)(3).

STATEMENT NAMING ADDITIONAL PARTIES

The parties to the proceedings below who are not reflected in the caption include the City of Oconomowoc, which intervened in the District Court and participated in the Court of Appeals; the Wisconsin Department of Natural Resources and its Secretary, George E. Meyer; and the Town of Summit, a Wisconsin municipal corporation. The Town of Summit did not participate in the proceedings in the Court of Appeals, and counsel for the petitioner has been informed by counsel for the Town that it will not be participating in these proceedings.

The United States Environmental Protection Agency, Carol Browner in her capacity as Administrator, and Valdus Adamkus in his capacity as Regional Administrator for EPA Region V, were initially parties in the District Court but were dismissed by stipulation, without prejudice. In the Court of Appeals the United States, on behalf of the United States Environmental Protection Agency, sought leave to file a brief *amicus curiae*, which was denied by the Court of Appeals on February 16, 1994. [App. 22a, 23a].

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PETITION FOR A WRIT OF CERTIROARI

The Petitioner, the Village of Oconomowoc Lake ("the Village"), a Wisconsin municipal corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled proceeding on May 18, 1994.

OPINIONS BELOW

On September 24, 1993, the United States District Court for the Eastern District of Wisconsin entered and

docketed a final judgment, dismissing petitioner's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, consistent with the written Decision and Order of the District Court issued on the same date. The District Court held, as a matter of law, that discharges of pollutants to waters of the United States that occur through shallow groundwater directly connected to a point source were not subject to regulation or jurisdiction under the Clean Water Act because groundwater is not among "waters of the United States" covered by 33 U.S.C. §§ 1311 and 1342. The Decision and Order of the District Court is reprinted in the Appendix at App. 13a-20a, and the judgment is reprinted in the Appendix at App. 21a.

On appeal, the Seventh Circuit Court of Appeals affirmed the judgment of the District Court in a decision entered May 18, 1994, and entered judgment consistent with the decision that same day. The decision is reported at *Village of Oconomowoc Lake v. Dayton Hudson, et al.*, 24 F.3d 962 (7th Cir. 1994), and a copy of the decision and judgment are reprinted in the Appendix at App. 1a-10a and App. 11a-12a, respectively.

JURISDICTION

The Seventh Circuit judgment for which review is sought was entered on May 18, 1994. [App. 11a-12a]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES AND REGULATIONS

This case concerns the issue of what constitutes a "discharge of any pollutant," as that phrase is used in Sections 301(a) and 402(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(a). The definition of "discharge of a pollutant" and "point source" are codified separately in Sections 502(12) and 502(14), respectively, 33 U.S.C. §§ 1362(12) and (14). The text of those statutes and the statute authorizing the regulation of storm water discharges, 33 U.S.C. § 1342(p) are set out in full in the appendix. [App. 68a-71a].

The petitioner's "citizens suit" was commenced in the District Court pursuant to Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), and Section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a). [App. 74a-78a; App. 72a-73a]. The regulation mandating authorized States to empower themselves to implement their storm water permitting programs and to actually implement their storm water programs consistently with the Clean Water Act and the standards promulgated by the United States Environmental Protection Agency is 40 C.F.R. § 123.25(a)(9). [App. 79a].

STATEMENT OF THE CASE

A. The Facility.

The Target Distribution Center (the "Facility") is a regional warehouse, owned and operated by Dayton Hudson Corp. ("Dayton Hudson"), for distributing merchandise to its Target Stores retail outlets. The Facility is

located on approximately 100 acres of land on the northwest corner of the intersection of State Highway 67 and County Highway B in the City of Oconomowoc, Waukesha County, State of Wisconsin.

Dayton Hudson commenced construction of the facility on or shortly after June 4, 1993. The building itself currently occupies approximately 1.1 million square feet of the 100-acre parcel, and it is expected to be expanded to 1.4 million square feet in two to three years. The roadways and associated parking areas for the Facility cover approximately 25 acres of the 100-acre parcel. The Facility is authorized to service up to 504 trucks per day and has parking for 672 employee vehicles. It is projected to employ 700 "full-time equivalent" employees, operating on two ten-hour shifts, Monday through Friday, and single 10-hour shifts on Saturday and Sunday.

All of the snow melt and precipitation runoff (collectively "storm water") from the building roof and impervious paved areas is directed to an unlined, 6-acre "exfiltration" pond, after passing through a sand "filter." Once in the pond, the storm water drains to a shallow groundwater aquifer that is approximately 15 feet below the ground surface, or a few feet below the bottom of the exfiltration pond.

The shallow groundwater system beneath the exfiltration pond is hydrologically connected to numerous, nearby surface waters that surround the Facility. Among such surface waters are wetlands, ponds, and two large lakes. Silver Lake is located approximately 0.4 miles west-southwest, and Oconomowoc Lake is located approximately 0.8 miles north-northeast. The Village of

Oconomowoc Lake surrounds the Lake, and the Village owns a substantial parcel of land closer to the facility, large portions of which are occupied by wetland areas and canals.

B. The Unpermitted Stormwater Discharges

No permit for storm water discharges associated with the Facility has ever been issued to Dayton Hudson. Discharges of storm water associated with an "industrial activity" are required to obtain National Pollution Discharge Elimination Program ("NPDES") permits from the EPA, or the State equivalent of such permits from States with EPA approved programs pursuant to Section 402 (p)(2)(B), (3) and (4), § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B), (3) and (4).

In 1975, Wisconsin and the Wisconsin Department of Natural Resources ("WDNR") first became authorized to implement the Wisconsin Pollution Discharge Elimination Program ("WPDES") in lieu of the NPDES program administered by the EPA under Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

Federal regulations mandate that authorized States and State agencies implementing the NPDES program secure adequate legal authority to implement and actually administer their storm water permit programs in a manner consistent with the regulations promulgated by EPA. 40 C.F.R. § 123.25(a)(9). [App. 79a].

Notwithstanding the federal mandate to secure adequate legal authority and actually implement a storm water permitting program consistent with the federal

regulations, 40 C.F.R. §§ 122.26 and 123.25(a)(9), as of the date that Dayton Hudson commenced construction of the Facility, June 4, 1993, the WDNR had not yet promulgated the necessary rules and regulations to begin processing or issuing permits for storm water discharges associated with industrial activity.[1] In the absence of the requisite regulatory authority, the WDNR was instructing new dischargers to simply file a "Notice of Intent" with the agency to indicate their intention to commence discharges and their desire to be covered by the regulations and permits the WDNR hoped to promulgate and begin issuing some time in the future.

Dayton Hudson filed such a Notice of Intent (NOI) with the WDNR on April 9, 1993. WDNR acknowledged receipt of the NOI by return letter dated April 22, 1993, indicating that "the State of Wisconsin [was] *in the process of* implementing a storm water discharge control program in accordance with federal regulations." [App. 65a-66a]. Since the WDNR could not issue a permit and Dayton Hudson did not apply for an EPA issued permit, no NPDES or WPDES permit was ever issued to Dayton Hudson for the Facility.

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[1] The Wisconsin legislature had, however, enacted chapter 147, Wis. Stats, requiring, *inter alia*, that an owner or operator of a facility "obtain a permit . . . for . . . [a] discharge associated with an industrial activity, including construction, that meets criteria in rules promulgated by the [WDNR]." § 147.021(1)(a), Wis. Stats. [App. 82a].

C. Proceeding In The Lower Courts.

The Village commenced an action in the United States District Court for the Eastern District of Wisconsin on July 30, 1993, against Dayton Hudson and the WDNR[2] asserting separate claims pursuant to the "citizen suit" statutes in the federal Clean Air Act, 42 U.S.C. § 7604(a), as well as the Clean Water Act, 33 U.S.C. § 1365(a). Prior to filing the action, the Village served a Notice of Intent to commence the action on July 26, 1991.

The Village did not wait 60 days before filing suit because the suit was, in part, premised upon 42 U.S.C. § 7604(a)(3), and the timing of the separate claim under 33 U.S.C. § 1365 was governed by the decisions in *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2nd Cir. 1991), *rev'd in part on other grounds*, ___ U.S. ___, 112 S.Ct. 2638 (1992),[3] and *Zands v. Nelson*, 779 F.Supp. 1254, 1260-61 (S.D.Cal. 1991). The Complaint alleged, *inter alia*, that the ongoing discharges of storm water associated with the industrial activity at the Facility, without a NPDES storm water permit, violated the Clean Water Act.

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[2] The City of Oconomowoc successfully moved to intervene in the District Court.

[3] This Court's order granting certiorari in *Dague* was explicitly limited to the question of whether a court may enhance an attorney fee awarded under § 7002 of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), or § 505 of the CWA, 33 U.S.C. § 1365(d), above the lodestar amount to reflect the fact that the attorneys had taken the case on a contingent fee basis.

On August 27, 1993, the defendants moved to dismiss the Complaint for lack of federal subject matter jurisdiction. On September 24, 1993, the Clerk of the District Court entered and docketed a final judgment, dismissing the Complaint. With respect to its decision to dismiss the Clean Water Act claims, the District Court held that the Village did not allege a claim upon which relief could be granted under the Clean Water Act because the Act does not extend to discharges of pollutants occurring through directly connected ground water systems because ground water is not among the "waters of the United States." As stated by the District Court: "The fact that groundwater pollution will eventually migrate into waters of the United States does not . . . bring such pollution within the terms of the CWA." (*Citing, Kelley v. United States*, 618 F.Supp. 1103, 1105-07 (W.D. Mich. 1985)). [App. 19a].

Upon entry of the final judgment by the Clerk of Court on September 24, 1993, the Village appealed the decision of the District Court dismissing the Complaint for lack of subject matter jurisdiction to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291. On February 15, 1994, while the case was pending before the Court of Appeals, the EPA filed a Motion for Leave to File Out of Time Brief for the United States as Amicus Curiae pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure, and a Brief in Support of the Motion. [App. 23a-64a]. The Seventh Circuit denied the motion by Order entered on February 16, 1994. [App. 22a].

On May 18, 1994, the Seventh Circuit Court of Appeals affirmed the decision of the District Court. The Seventh Circuit found that "[n]either the CWA nor the

EPA's definition asserts authority over ground waters, just because these may be hydrologically connected to surface waters." [App. 7a]. In holding that Congress intended to exclude ground waters from regulation under the Act, the Seventh Circuit noted that "EPA has noted the potential connection between ground waters and surface waters, but has left the regulatory definition alone." *Citing Preamble to NPDES Permit Application Regulations for Stormwater Discharges*, 55 Fed. Reg. 47990 (Nov. 16, 1990). [App. 8a-9a].

On August 16, 1994 the Village filed this Petition.

REASONS FOR GRANTING THE WRIT

The decision below held that a discharge of pollutants to waters of the United States is beyond the jurisdiction of the Clean Water Act if the discharge occurs through a shallow groundwater system that is directly connected to the point source and the nearby surface water.

The petition for a writ of certiorari should be granted in this case because: (1) the decision is contrary to the authoritative interpretation of the Clean Water Act rendered by the United States Environmental Protection Agency ("EPA"), the agency that is responsible for interpreting the scope of the Clean Water Act in the first instance, according to its considerable technical expertise and judgement; (2) the substantial authorities contrary to the Court of Appeals' decision indicate that the scope of the act is at worst ambiguous, which would require deference to EPA's construction of its own authority; and (3)

the Court of Appeals has decided a narrow, purely legal issue of great national importance, in a manner that is contradictory Congress' explicit statement of national policy because the practical effect of the decision is to promote the pollution of the Nation's waters.

The Court of Appeals' decision is in conflict with the decisions of this Court, the decisions of other Circuit Courts of Appeal and District Courts in other Circuits. Such a decision should not be allowed to stand without careful review by this Court.

I. The Seventh Circuit's Decision is Contrary To EPA's Interpretation Of Its Jurisdiction And The Standards Established By This Court For Disregarding That Interpretation.

The stated objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, Congress has prohibited the "discharge of any pollutant" in the absence of a permit issued by the United States Environmental Protection Agency ("EPA") or an authorized State.

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a). Pursuant to 33 U.S.C. § 1342(a), Congress has authorized the Administrator of EPA or a State with an EPA-approved program, to issue permits for the "discharge of any pollutant," and pursuant to 33 U.S.C § 1342(p)(4), Congress directed the Administrator

of EPA or an authorized State to begin issuing or denying permits for the discharge of pollutants occurring as a result of storm water discharges associated with industrial activity, "[n]ot later than 4 years after February 4, 1987."[4]

Rather than focusing on whether a "discharge of any pollutant" to waters of the United States without a permit had been alleged, the Seventh Circuit Court of Appeals focused entirely on the particular *means* by which the pollutants were alleged to be discharged to waters of the United States.[5] Since the shallow, hydrologically connected groundwater system, the means of the alleged discharge, was not itself a "water[s] of the United States," the Court of Appeals held that the discharge of pollutants thereby conveyed and discharged to waters of the United States was not subject to federal regulation or jurisdiction under the Clean Water Act.

Contrary to the Court of Appeals' decision, the EPA has consistently and reasonably interpreted the phrase "discharge of any pollutant" to include discharges that occur through hydrologically connected groundwater systems.

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[4] The EPA dutifully promulgated regulations to regulate the discharge of pollutants in industrial stormwater discharges, 40 C.F.R. § 122.26, and required all authorized State programs to be legally authorized and implemented in accordance with those requirements. 40 C.F.R. § 123.25(a)(9).

[5] Congress defined the term "point source" as "including but not limited to" such underground features as tunnels, wells and fissures. 33 U.S.C. § 1362(14). The definition is, by its terms, inclusive rather than limited.

> Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered to be "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.

Amendments to the Water Quality Standards Regulation That Pertains to Standards on Indian Lands, Final Rule, 56 Fed. Reg. 64876, 64892 (U.S. EPA, December 12, 1991). See also, *National Pollution Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations*, U.S. EPA Region 6, Final Permitting Decision, 58 Fed. Reg. 7610, 7623, 7631 (U.S. EPA, February 8, 1993); *National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, Final Rule, 55 Fed. Reg. 47990, 47996, 47997 (U.S. EPA, November 16, 1990). [App. 80a-83a].

EPA's interpretation reflects its technical expertise and judgment, and it promotes the essential purpose of the Act, which is to restore and maintain the quality and integrity of the Nation's waters. 33 U.S.C. § 1251(a). Under EPA's interpretation, dischargers cannot escape

regulation by pumping their pollutants into the groundwater or allowing their pollutants to "exfiltrate" into groundwater from containment basins if the pollutants are discharged through directly connected groundwater systems to nearby surface waters. In other words, EPA does not allow dischargers of pollutants to do indirectly what the Clean Water Act expressly forbids them from doing directly.

Under similar circumstances in *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct 1046, 1056-57 (1992), this Court reversed the Court of Appeals because it had failed to defer to EPA's technical expertise and judgment in construing and applying its authority under the same statute at issue in this case, 33 U.S.C. § 1342. In the past, this Court has also carefully instructed the Court of Appeals on the very limited circumstances in which EPA's interpretation and application of its authority may be disregarded or superseded. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

The decision of the Court of Appeals in this case not only disregards EPA's authoritative interpretation of the Act, without even paying lip service to the standards established under *Chevron*, in fact it actually promotes the pollution of the Nation's waters. The practical effect of the decision is to encourage regulated dischargers to redirect their discharges to shallow, directly connected groundwater systems that discharge to surface waters because, under the Court of Appeals' construction of the Clean Water Act, the EPA is powerless to regulate such discharges or prevent the resulting pollution of the Nation's waters.

The Court of Appeals' decision is even inconsistent with the Seventh Circuit's own decision in *Inland Steel Company v. EPA*, 901 F.2d 1419, 1422-23 (7th Cir. 1990):

> Second, since the legal concept of navigable waters might include ground waters connected to surface waters – though whether it does or not is an unresolved question . . . – a well that ended in such connected ground waters might be within the scope of the [Clean Water] Act. *But the waters at the bottom of these wells are not connected to surface waters.* (emphasis added) [citations omitted].

The only factual difference between this case and *Inland Steel* is that this case *does* concern an alleged discharge of pollutants from a point source, through directly connected shallow groundwater, to navigable waters. The only legal difference between this case and *Inland Steel* is that in *Inland Steel* the Seventh Circuit Court of Appeals deferred to EPA's interpretation of the Act, as required by *Chevron*, because EPA's interpretation was not contrary to the express language of the statutes in question and was supported by the underlying policies of the Act. *Id.*, 901 F.2d at 1424.

In this case the EPA's interpretation of its jurisdiction to regulate the "discharge of a pollutant" is not contrary to the express language of the statutes. It is consistent with the stated policy of the Act, and, under *Chevron*, EPA's interpretation is entitled to deference. The Seventh Circuit's decision is contrary to all of these, and it should be reviewed and reversed.

II. This Case Presents A Narrow Legal Issue of National Importance Which This Court Should Resolve.

The vigor with which the Court of Appeals narrowly circumscribed the regulation of a "discharge of any pollutant" under the Clean Water Act in this case creates a huge hole in the regulatory program through which great quantities of pollutants may be discharged to the Nation's waters. The decision raises substantial questions regarding the continued efficacy of EPA's interpretation of its jurisdiction. And, it creates a conflict between the Court of Appeals' decision and the better reasoned authorities that have deferred to or concurred with EPA's interpretation of its jurisdiction.

As noted above, the Court of Appeals' decision in this case is in conflict with the reasoning of the Seventh Circuit's own decision in *Inland Steel*, in which the Court of Appeals deferred to EPA's interpretation of the Clean Water Act. In another case, decided by the Fifth Circuit, *Exxon Corp. v. Train*, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977), the Court of Appeals refused to extend EPA's Clean Water Act jurisdiction to *isolated* groundwaters, where there was no allegation of any discharge to surface waters; however, the Court of Appeals expressly disclaimed that, "We mean to express no opinion on what the result would be if that were the state of facts."

At the time this case was pending, a District Court in the Tenth Circuit issued a decision reaching exactly the opposite conclusion of the Court of Appeals in this case. *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428 (D.Colo. 1993). In that case the court held:

> These decisions leave little doubt that the Tenth Circuit has chosen to interpret the terminology of the Clean Water Act broadly to give full effect to Congress' declared policy "to restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). With this in mind, I conclude that the Clean Water Act's preclusion of the discharge of any pollutant in "navigable waters" includes such discharge which reaches "navigable waters" through groundwater. I therefore find that Sierra Club's allegations that CRC has and continues to discharge pollutants into the soils and groundwater beneath the refinery which then make their way to Sand Creek through the groundwater state a cause of action under the Clean Water Act. Accordingly, I deny CRC's Rule 12(b)(6) motion to dismiss the first cause of action.

Id. at 1434;[6] *discussing, United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373, 375 (10th Cir. 1979) and *Quivira Mining Co. v. United States EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

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[6] At the request of the defendants, the quoted decision was certified for immediate appeal to the Tenth Circuit. On June 20, 1994, the Tenth Circuit dismissed the interlocutory appeal as having been improvidently granted. *See* [App. 83a-85a]. In a subsequent decision the District Court dismissed the action on the basis of an existing Consent Order and the jurisdictional bar in 33 U.S.C. § 1319(g)(6)(A)(ii). *Sierra Club v. Colorado Refining Co.*, 38 E.R.C. 1697, 1704-1706 (D.Colo. 1994). That final judgment is now on appeal and cross-appeal to the Tenth Circuit, Docket No. 94-1248 (May 24, 1994) and Docket No. 94-1265 (June 9, 1994).

In another case, out of the Ninth Circuit, *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F.Supp. 1182, 1193-96 (E.D.Cal. 1988) (*"MESS I"*), the District Court concluded that some discharges to groundwater could be subject to regulation under the Clean Water Act if the groundwater was "naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act." *Id.* at 1196. The District Court subsequently denied summary judgment to the defendants, based on conflicting expert evidence, holding that the plaintiffs should have an opportunity to prove at trial that seepage from the waste pits into the groundwater had a "reasonably foreseeable and temporally imminent effect on surface waters of the United States." *McClellan Ecological Seepage Situation v. Cheney*, 763 F.Supp. 431, 437 (E.D.Cal. 1989) (*"MESS II"*).

Indeed, the *only* court that has ever construed the Clean Water Act similarly to the Court of Appeals in this case is the District Court in *Kelley v. United States*, 618 F.Supp. 1103, 1106-07 (W.D. Mich. 1985) (*"Kelley II"*), in the Sixth Circuit. That decision rejected an earlier, unpublished decision from the very same court, *Kelley v. United States*, No. 79-10199, slip op. at 2-3 (E.D. Mich. Oct. 28, 1980) (*"Kelley I"*). *See also, Sierra Club v. Colorado Refining Co.*, 838 F.Supp. at 1433, discussing *Kelley I* and *Kelley II*. The District Court in *Kelley II* made the same mistake as the Court of Appeals in this case, holding that the "unmistakably clear" legislative history demonstrated that Congress "did not intend the Clean Water Act to extend federal regulatory enforcement authority over groundwater contamination," regardless of whether the toxic chemicals were being discharged into the East Arm

of Grand Traverse Bay, which was indisputably a navigable water of the United States. *Id.* at 1107.

Even if it is "clear" that Congress did not intend to federally regulate *all* groundwater contamination,[7] that is not the issue presented by this case. The Village has never suggested that Congress intended to regulate all groundwater contamination. What the Village alleged in this case was a "discharge of any pollutant" to waters of the United States, from a point source, through a directly connected shallow groundwater system. This is precisely the issue that the Fifth Circuit declined to rule on in *Exxon Corp. v. Train* and that the Seventh Circuit expressly reserved ruling on in *Inland Steel Co. v. EPA*. It is also the issue on which EPA has a well-developed interpretation which was inexplicably rejected by the Seventh Circuit Court of Appeals in this case.

The Village submits that the issue presented is too narrow and too important to allow contradictory interpretations in courts across the country based on variations in those courts' willingness to defer to EPA's authoritative interpretation. On balance, the Court of Appeals decision in this case in an anomaly. The time is ripe to resolve the issue of EPA's and the Clean Water Act's jurisdiction that has been squarely presented by a badly reasoned decision of the Seventh Circuit Court of Appeals.

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[7] Even the decision below conceded that, "Decisions not to enact proposed legislation are not conclusive of the meaning of the text actually enacted. Laws sometimes surprise their authors." [App. 8a].

III. The Court Of Appeals' Decision May Leave A Gaping Hole In Federal Environmental Regulation That Was Not Intended By Congress.

Aside from the obvious impacts that the Court of Appeals' decision may have on EPA's regulatory program under the Clean Water Act, the broad brush pronouncement of the Court of Appeals in this case may also have dire consequences for other environmental regulatory programs, which was neither intended nor anticipated by Congress. One good example is the interrelationship between the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Oil Pollution Act of 1990 ("OPA").

It is well established that CERCLA covers discharges of "hazardous substances" anywhere and everywhere, but it expressly excludes "petroleum." *Wilshire Westwood Assocs. v. Atlantic Richfield*, 881 F.2d 801 (9th Cir. 1989), construing the "petroleum exclusion" in 42 U.S.C. § 9601(14). In contrast, although OPA clearly covers discharges of "petroleum" or "oil," it is expressly limited to discharges to "navigable waters." 33 U.S.C. §§ 2701(23), 2702(a). And, under OPA, "navigable waters" are defined as, "waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21).

Under the narrowly circumscribed interpretation of a "discharge" to "waters of the United States" pronounced by the Court of Appeals in this case, one could literally spill or discharge thousands of gallons of petroleum to a shallow groundwater system, knowing full well that it will seep into a directly connected, nearby navigable water, and according to the Seventh Circuit the discharge

would escape any federal regulation or response authority. There is no good reason for creating such a hole in environmental regulation. *Cf. Inland Steel Co. v. EPA*, 901 F.2d 1419, 1423 (7th Cir. 1990). Clearly, this is not what Congress intended.

CONCLUSION

The issue in this case has been squarely presented. The interpretation of the statutes by the responsible federal agency is well established, and the national policy is clear. There appears to have been no good reason for the Court of Appeals to have disregarded EPA's interpretation of its jurisdiction or this Court's decisions in *Chevron* and *Arkansas v. Oklahoma*.

The potential for damage to the Nation's waters and the potential uncertainty regarding EPA's existing regulatory program and permits is too great not to address this narrow issue at this time. For all of the foregoing reasons, the Village of Oconomowoc Lake urges this Court to grant the petition, accept this case for review, and reverse the decision of the Court of Appeals.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 93-3380

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON HUDSON CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93-C-0797-**John W. Reynolds,** *Judge.*

ARGUED FEBRUARY 16, 1994 – DECIDED MAY 18, 1994

Before EASTERBROOK and MANION, *Circuit Judges,* and McDADE, *District Judge.**

EASTERBROOK, *Circuit Judge.* Target Stores, a division of Dayton Hudson Corporation, is building a warehouse (which it calls a "distribution center") in the City of Oconomowoc, Wisconsin. It holds all necessary state and local permits. Federal clearance is unnecessary, for the

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* Hon. Joe Billy McDade, of the Central District of Illinois, sitting by designation.

Environmental Protection Agency has authorized Wisconsin to perform the tasks required by the Clean Air and Clean Water Acts. The Village of Oconomowoc Lake, a nearby municipality, wishes the warehouse would disappear. We have for decision one among more than a dozen suits and administrative proceedings the Village has commenced in pursuit of that objective.

Warehouses do not spew pollutants, but they have indirect effects. Trucks that carry goods to and from the warehouse emit nitrogen oxides and other gasses. A well-sited warehouse cuts down on wasted movement of goods, and therefore on pollution in the United States as a whole, but increases the volume of emissions nearby. While parked near the warehouse trucks drip oil, which collects in the runoff from a storm. A few inches of rain falling on a large paved surface means many acre-feet of water. This warehouse has a retention pond, from which the water seeps into the ground – carrying hydrocarbons and other unwelcome substances, the Village fears.

State officials concluded that the warehouse would be such a trivial source of pollution that it should not be classified as a "major source" requiring full scrutiny. The Village wanted a federal judge to inquire further, but the judge declined to cooperate. The Clean Air Act requires permits only for "stationary sources" of pollution. A definitional provision provides not only that vehicles are not "stationary sources" but also that vehicular emissions are not attributed to the buildings served as points of origin or destination. 42 U.S.C. §7602(z); see also 42 U.S.C. §7410(a)(5)(C). Whatever requirements the state has added to federal law must be enforced in state court, the judge held. As for the rainwater runoff: the Clean Water

Act regulates discharges into "navigable waters from a point source". 33 U.S.C. §1362(12). Parking lots and retention ponds are not exactly "navigable," but another statute defines "navigable waters" as all "waters of the United States". 33 U.S.C. §1362(7). Some water from the pond evaporates into the air, and the rest seeps into the ground. Even though ground water eventually reaches streams, lakes, and oceans, the court held, it is not part of the "waters of the United States". The district court accordingly dismissed the complaint under Fed. R. Civ. P. 12(b)(1).

As a rule, persons wishing to sue under the Clean Air Act must give 60 days' notice to the potential defendant. 42 U.S.C. §7604(b). Notice provisions pervade environmental statutes, and would-be plaintiffs often appear to be desperate to evade them. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir. 1992). Why plaintiffs are unwilling to wait even 60 days – when an effort to jump the queue may lead to outright dismissal of the case under *Hallstrom* – eludes us. The Village filed suit only three days after giving notice. To justify this expedition, it invoked 42 U.S.C. §7604(a)(3), which is not subject to the 60-day rule. Although this enabled it to sue 57 days sooner than it could have done had it used §7604(a)(1) as the foundation for the suit, the strategy does little besides illustrate the adage that haste makes waste. (This saying predates the Clean Air Act and shows that not all waste is within federal jurisdiction.)

Section 7604(a)(3) permits a citizen to file a civil action

> against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under . . . part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The warehouse is in a "nonattainment" area, and the Village contends that it lacks the permit required for a "major emitting facility". Wisconsin treated the warehouse as a minor rather than a major source. But to use §7604(a)(3) the Village had to show that "part D of subchapter I of this chapter" requires a major-facility permit, and it is impossible to see how this could be so. Recall that the warehouse itself does not emit pollutants and that the Clean Air Act does not require the attribution of motor-vehicle emissions to stationary sources. 42 U.S.C. §7410(a)(5)(A), (C); see also *South Terminal Corp. v. EPA*, 504 F.2d 646, 668 n.24 (1st Cir. 1974). "[P]art D of subchapter I" does not require Dayton Hudson to obtain a permit; any such requirement must come from Wisconsin law and therefore cannot serve as the foundation for suit under §7604(a)(3).

If the Village had waited for the prescribed 60 days, it would have been eligible to use §7604(a)(1), which authorizes citizen suits

> against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

If this had been the foundation of the suit, and if we were to assume that the emissions from trucks going to and

from the warehouse violate Wisconsin's implementation plan – for the state has elected to regulate such indirect emissions despite the lack of federal compulsion to do so – then it would have been necessary to decide whether a provision of a state plan going beyond the federal minima is "an emission standard or limitation under this chapter". States must clear their implementation plans with the EPA and enforce them faithfully; it is accordingly possible to characterize a state's rules as "an emission standard or limitation under this chapter" in the sense that it is *adopted* under the chapter and includes rules that *satisfy* the chapter. It may even be that rules going beyond federal requirements are essential to satisfy federal law. How could that be? Suppose the EPA approved a plan that was less stringent in some respects than the EPA would have demanded, only because in other respects it did more than federal law required and the rules, taken as a whole, would produce the desired cleanliness. Then failure to comply with the "extra" rules would reduce air quality below the federal minimum. The EPA believes that federal courts (and the Administrator) may enforce provisions in state plans. 40 C.F.R. §51.165(a)(1)(xiv). We need not decide whether this means enforcement under §7604(a)(1), as some courts have held. E.g., *Coalition Against Columbus Center v. New York City*, 967 F.2d 764, 771 (2d Cir. 1992); *Delaware Valley Citizens Council v. Davis*, 932 F.2d 3256, 265-67 (3d Cir. 1991). See also *Sierra Club v. Larson*, 2 F.3d 462, 469 (1st Cir. 1993) (remarking that indirect-source rules in a state implementation plan "may at least in some circumstances be within the purview of a citizens suit under 42 U.S.C. §7604."). But see *Atlantic States Legal Foundation, Inc. v.*

Eastman Kodak Co., 12 F.3d 353, 358-60 (2d Cir. 1993) (provisions of state plans exceeding federal requirements are not enforceable under provisions of the Clean Water Act parallel to §7604). There will be ample opportunity for full consideration when the need arises.

The Village's claim under the Clean Water Act does not depend on any state rule or plan. This time the obstacle is the limitation of the Act's coverage to the "waters of the United States." Rainwater runoff from the 110-acre site (including 25 acres of paved parking) will collect in a 6-acre artificial pond. The pond is supposed to retain oil, grease, and other pollutants while "exfiltrating" the water to the ground below. The Clean Water Act is a broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). But not even the EPA shares Justice Story's view that the national government has regulatory power over every drop of water: "It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it." Note, 37 Am. L. Rev. 911, 916 (1903). See *DeLovio v. Boit*, 7 Fed. Cas. 418 (No. 3,776) (CC Mass. 1815). The Agency's regulatory definition of "waters of the United States" includes "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce". 40 C.F.R. §230.3(s)(3). *Hoffman Homes, Inc. v. Administrator, EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993), concluded that

the EPA did not exceed its power when promulgating this definition but that even a rule with such broad scope did not cover a one-acre wetland 750 feet from a small creek. A six-acre retention pond, farther from a body of surface water, is an easier case. The EPA's definition speaks of "natural ponds"; Dayton Hudson built an artificial pond.

What of the possibility that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the "waters of the United States"? Justice Story's bucket was part of the navigable waters in this sense. We know from *Wickard v. Filburn*, 317 U.S. 111 (1942), that wheat a farmer bakes into bread and eats at home is part of "interstate commerce" because these activities affect the volume of interstate shipments. On a similar rationale all ground waters *could* be thought within the power of the national government. *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990) (reserving the question). But the Clean Water Act does not attempt to assert national power to the fullest. "Waters *of the United States*" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.) Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.

The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own. The

most concerted effort in Congress occurred in 1972, and the Senate Committee on Public Works explained why it had not accepted these proposals:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1972). See also *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977) (recounting this history). In other words, Congress elected to leave the subject to state law – and Wisconsin has elected to permit Target Stores to build a warehouse that will affect the local ground waters.

Decisions not to enact proposed legislation are not conclusive on the meaning of the text actually enacted. Laws sometimes surprise their authors. But we are confident that the statute Congress enacted excludes *some* waters, and ground waters are a logical candidate. Two courts have held that ground waters are not part of the (statutory) "waters of the United States." *Exxon; Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985). The possibility of a hydrological connection cannot be denied, see *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 437 (E.D. Cal. 1989), but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation. On several occasions the EPA has noted the potential connection between ground waters and surface waters, but it has left the regulatory

definition alone. E.g., Preamble to NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) ("[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.") Collateral reference to a problem is not a satisfactory substitute for focused attention in rulemaking or adjudication. By amending its regulations, the EPA could pose a harder question. As the statute and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters.

AFFIRMED

MANION, *Circuit Judge*, concurring. I agree with the court's holding that the plaintiff's claims invoking the Clean Air Act and the Clean Water Act should fail. For whatever reason the Village of Oconomowoc Lake wishes the warehouse would disappear (be it political, environmental, or simple resentment because it doesn't get a bite at the tax base), the regulations under the Clean Air and Clean Water Acts do not facilitate the attack. In addition, I would not speculate how to characterize a citizen's suit under §7604(a)(1). Before federal courts begin deciding under the Clean Air Act whether or not such things as shopping malls are permissible because of their side effects, we should ensure that Congress has specifically authorized the EPA to regulate at that level. Nor would I suggest that the EPA can figuratively "wade in" to ground water as part of the waters of the United States without first having specific direction from Congress to

do so. This would take more than a simple amendment of regulations by the administrators at the EPA. Regulations are promulgated at the direction of Congress, and at this juncture, Congress has not permitted collateral attacks against parking lots, septic tanks, and sprinkler systems – the natural consequence if we were to approve the interpretation espoused by the plaintiffs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 18, 1994

BEFORE: **Honorable** FRANK H. EASTERBROOK,
Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Honorable JOE BILLY MCDADE,
District Judge*

No. 93-3380

VILLAGE OCONOMOWOC,
Plaintiff - Appellant

v.

DAYTON-HUDSON CORPORATION, GEORGE E. MEYER, Secretary of the Wisconsin Department of Natural Resources, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, et al.,
Defendants - Appellees

and

CITY OF OCONOMOWOC,
Intervenor - Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 93 C 797, John W. Reynolds, Judge

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* The Honorable Joe Billy McDade, of the Central District of Illinois, is sitting by designation.

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

Copy mailed to Attorneys for parties by the court pursuant to rule 77(O) Federal rules of civil procedure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and the TOWN OF SUMMIT,

Plaintiffs,

v.

DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary; and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants,

and

CITY OF OCONOMOWOC

Intervenor.

Civil Action
No. 93-C-0797

(Filed
Sept. 24, 1988)

DECISION AND ORDER

Plaintiffs Village of Oconomowoc Lake ("The Village") and the Town of Summit (the "Town") claim that the ongoing construction in the City of Oconomowoc ("the City") of a distribution center for Target Stores, a division of defendant Dayton-Hudson Corporation

("Dayton-Hudson"), violates the Clean Air Act and Clean Water Act because pollution permits necessary to the construction and operation of the center have not been properly issued. On August 27, 1993, defendants moved that this action be dismissed for lack of subject matter jurisdiction, or that the court abstain from deciding it because of pending state litigation. For reasons stated below, the motion to dismiss will be granted.

I. The Clean Air Act Claim

Plaintiffs claim that when the distribution center becomes operational in August, 1994, the trucks and employee vehicles travelling to and from it will emit at least 300 tons of nitrogen oxides per year, as well as 260 tons of carbon monoxide per year. (Compl. at ¶ 27, Ex. B at ¶ 5.) Because nitrogen oxides combine with other matter to form ozone, plaintiffs say, operation of the center will increase the level of ozone pollution in southeastern Wisconsin, where the ozone level already exceeds what it should be under the applicable National Ambient Air Quality Standard ("NAAQS"). (*Id.* at ¶ 27.) Plaintiffs contend that under these circumstances, the Clean Air Act ("CAA"), 42 U.S.C. §§ 7502(c)(5), 7503, and Wisconsin's State Implementation Plan ("SIP"), Wis. Stat. § 144.30 *et seq.*, require that prior to construction of the center, which began June 4, Dayton-Hudson obtain and the state issue a permit treating the center as a "major emitting facility" or "major stationary source" being constructed in an NAAQS "nonattainment area."[1]

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[1] Under the CAA, the EPA is required to establish an NAAQS for each of various air pollutants, and each state is

No such permit was issued. Rather, on May 19, 1993, the defendant Wisconsin Department of Natural Resources ("DNR") issued to Target Stores an "air pollution control permit" describing the center as a "minor, new, attainment air pollution source." Issuance of the permit was not, therefore, subject to the far more stringent standards applicable to the issuance of permit for construction of a major emitting facility or major stationary source in a nonattainment area. *See* Wis. Stat. § 144.393; 42 U.S.C. § 7503(a).

Plaintiffs' suit challenging Dayton-Hudson's failure to obtain such a permit is brought pursuant to Section 304(a)(3) of the CAA, which provides in part that "any person may commence a civil action . . . against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under" parts C or D of the Act. 42 U.S.C. § 7604(a)(3). Those parts provide, among other things, that permits must be issued prior to the construction of any "major emitting facility" or of any "major stationary source" in a nonattainment area. 42 U.S.C. §§ 7475(a), 7502(c)(5).

Defendants contend that the citizen-suit provision upon which plaintiffs rely is inapplicable because the distribution center is not a facility for which a permit is required under parts C or D of the CAA.[2] Indeed, it is

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required to develop and adopt a SIP, through which the NAAQS is to be attained. 42 U.S.C. §§ 7408-7410.

[2] Plaintiffs contend that because defendants' argument goes to the substance of their federal claim, the motion to dismiss for lack of jurisdiction (under Fed. R. Civ. P. 12(b)(1))

clear that the CAA does not itself require a permit for a facility like the distribution center. Permits are required only for a "major emitting facility" or "major stationary source," both of which refer to a "stationary . . . source" of pollution. 42 U.S.C. § 7602(j). "Stationary source" is defined to mean "any source of an air pollutant *except those emissions resulting directly from an internal combustion engine for transportation purposes* or from a nonroad engine or nonroad vehicle." 42 U.S.C. § 7602(z) (emphasis added). Because the distribution center will cause only the excepted type of emission, it cannot be a major emitting facility or major stationary source within the meaning of the CAA. Thus, the CAA does not by its own terms require that Dayton-Hudson obtain a permit for the center.

The exception for internal combustion engines to the permit requirements of Parts C and D is consistent with a related provision in Section 110 of Part A, 42 U.S.C. § 7410, which sets forth the conditions to federal approval of state implementation plans. That section provides that the Environmental Protection Agency ("EPA") may *not* require as a condition of approving a plan that the plan include a program for determining whether an "indirect source" of air pollution would cause or contribute to nonattainment of an NAAQS. 42 U.S.C. § 7410(5)(A)(i). "Indirect source" is defined to mean "a facility, building,

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should be treated instead as a motion to dismiss for failure to state a claim (under Fed. R. Civ. P. 12(b) (6)), in which case no facts other than those alleged in the pleadings may be considered. The court need not resolve this conceptual wrinkle, however, because its decision does not hinge on facts outside the complaint.

structure, installation, real property, road, or highway which attracts, or may attract, *mobile sources of pollution*." 42 U.S.C. § 7410(a)(5)(C) (emphasis added). There is no dispute that the distribution center falls within this definition and that, therefore, the EPA could not have required Wisconsin to include in its SIP a program under which a permit for the center would have been necessary.

Plaintiffs point out, however, that although Wisconsin was not required to adopt an "indirect source review program," it has chosen to do so, and the program, along with the rest of the Wisconsin SIP, has been approved by the EPA in accordance with the CAA. *See* 42 U.S.C. § 7410(a)(5)(A)(i). As a result of that approval, plaintiffs contend, the requirements of the Wisconsin SIP have become, in effect, the requirements of the CAA. Thus, plaintiffs say, if the SIP requires Dayton-Hudson to obtain a major-source permit prior to construction of the center, then the permit is also required under the CAA, and so the citizen-suit provision applies.

The difficulty with this analysis is that the pertinent citizen-suit provision refers only to permits "required under" Parts C or D of the Act, and nothing in those parts purports to incorporate by reference the permit requirements of an approved SIP. This is significant, because when Congress intended to allow civil actions or enforcement actions based on noncompliance with the terms of a SIP, as opposed to the terms of the CAA, it made that clear. Under a separate citizen-suit provision, for example, a federal suit may be brought against "any person . . . who is alleged to be in violation of . . . an emission standard or limitation under this Act," and such a standard or limitation is defined to include any "standard,

limitation, or schedule established . . . under any applicable State implementation plan." 42 U.S.C. §§ 7604(a)(1), 7604(f)(4). *See also* 42 U.S.C. § 7413(a)(l) (permitting EPA to issue orders requiring compliance with "an applicable implementation plan").

Thus, as the citizen-suit provision upon which plaintiffs rely refers only to permits required under Parts C and D of the Act, it cannot afford a basis for challenging the failure to issue or obtain a permit required under a state implementation plan. Because that is indeed the nature of the instant claim, the court lacks jurisdiction to hear it, and the claim must therefore be dismissed.

II. The Clean Water Act Claim

The Clean Water Act ("CWA") prohibits the discharge of pollutants into the "waters of the United States" without a National Pollutant Discharge Elimination System ("NPDES") permit, which is to be issued by the EPA unless a state permit program has been adopted and approved. 33 U.S.C. §§ 1311(a), 1342(a), 1342(b). Plaintiffs claim that construction of the distribution center requires an NPDES permit because stormwater runoff from the construction site will be intentionally discharged from a large retention pond into the groundwater system, through which the polluted runoff will migrate "into nearby wetlands and surface waters that are waters of the United States." (Compl. at ¶¶ 45-50.) Plaintiffs further claim that an application for a stormwater discharge permit filed by Dayton-Hudson's general contractor on April 9, 1993, and the DNR's subsequent acceptance of the application, did not satisfy the requirements applicable to

an NPDES permit. Indeed, plaintiffs claim, the state has failed to obtain federal authority to issue such permits. (Compl. at ¶ 66.)

Defendants contend that plaintiffs have failed to state a violation of the CWA because they allege that the stormwater will be directly discharged only into the groundwater system, and groundwater is not among the "waters of the United States."[3] This position finds direct support in *Kelley v. United States*, 618 F. Supp. 1103, 1105-1107 (W.D. Mich. 1985), where the court held, based on a thorough analysis of the CWA's legislative history and related caselaw, that the CWA does not cover "groundwater contamination." Plaintiffs argue, however, that their case differs from *Kelley* because they have alleged that the polluted stormwater will migrate through the groundwater system into "nearby wetlands and surface waters." But *Kelley* in fact involved a similar claim, which the court described as follows:

> Plaintiffs further allege that these chemicals contaminated the groundwater underlying the Air Station and that the plume of contamination is migrating downgradient in a north-easterly direction through East Bay Township and eventually discharging into the East Arm of Grand Traverse Bay.

Kelley, 618 F. Supp. at 1105. The fact that groundwater pollution will eventually migrate into waters of the United States does not, therefore, bring such pollution within the terms of the CWA.

---

[3] See note 2, *supra*.

Thus, because plaintiff's CWA claim is based on allegations of groundwater pollution, the claim must be dismissed.

IT IS THEREFORE ORDERED that defendants' August 27, 1993 motion to dismiss is GRANTED and this action DISMISSED.

Dated at Milwaukee, Wisconsin, this 24th day of September, 1993.

BY THE COURT

/s/ John W. Reynolds
John W. Reynolds
Senior Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and TOWN OF SUMMIT,

v.

DAYTON-HUDSON CORPORATION, et al.

JUDGMENT IN A CIVIL CASE

(Filed Sep. 24, 1993)

CASE NUMBER 93-C-797

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motions to dismiss are granted and this action is hereby DISMISSED.

September 24, 1993
Date

SOFRON B. NEDILSKY
Clerk

/s/ Rita Zevers
(By) Deputy Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 16, 1994

By the Court:

VILLAGE OCONOMOWOC, Plaintiff-Appellant, No. 93-3380 v. DAYTON-HUDSON CORPORATION, GEORGE E. MEYER, Secretary of the Wisconsin Department of Natural Resources, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, et al., Defendants-Appellees, and, CITY OF OCONOMOWOC, Intervenor-Appellee.	]]]]]]]]]]]]]]	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 93 C 797 John W. Reynolds, Judge.

Upon consideration of the **"MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF FOR THE UNITED STATES AS AMICUS CURIAE"** FILED 2/15/94, by counsel for the United States,

IT IS ORDERED that the motion is **DENIED.**

No. 93-3380

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary; and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
THE HONORABLE JOHN W. REYNOLDS, PRESIDING

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3380

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary; and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 26 of this Court, the United States of America hereby moves for leave to file out of time a brief as *amicus curiae* in the above-referenced action. The grounds for this motion are explained below and are supported by the attached Declaration of Carol Annette Petsonk, Trial Attorney, Policy, Legislation and Special Litigation Section, Environment and Natural Resources Division, United States Department of Justice. In accordance with Rule 31 of this Court, fifteen copies of the Brief for the United States as *Amicus Curiae* are

attached to this motion. Copies of the Motion, Declaration, and Brief have been sent today by overnight mail to counsel for the parties.

1. The above-referenced lawsuit is a "citizens' suit" brought under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

2. The United States was originally a party to the lawsuit, and was dropped from the litigation by stipulation of the parties on August 26, 1993.

3. Because the United States was dismissed from the action early on in the litigation, the United States was not required to file briefs on the issue in the Court of Appeals. When the parties filed their briefs, the United States reviewed them to determine the appropriateness of filing an *amicus curiae* submission.

4. Mindful of this Court's admonition in its Rule 29 to ascertain the position of the parties,[1] the United States examined all of the briefs of the parties. On the basis of this review, the United States determined that the current posture of the case, as well as perspectives unaddressed by the parties in their briefs, presented significant issues involving the interest of the United States in the effective enforcement of the Clean Water Act and the Clean Air Act. Petsonk Decl. at ¶ 5.

---

[1] Rule 29(a) of this Court provides, "Before completing the preparation of an *amicus* brief, counsel for an *amicus curiae* shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the *amicus* brief."

5. At the time briefing on the case was concluded, President Clinton was involved in developing his position on a number of issues in the context of the current legislative debate on reauthorization of the Clean Water Act. Petsonk Decl. at ¶ 6. Included in this was the development of a position on the legal issue of the relationship between groundwater and surface water. Petsonk Decl. at ¶ 7. The necessity of coordinating our legal position in the attached brief with the Administration's legislative position in the context of CWA reauthorization resulted in substantial delay in our finalization of the legal position contained in the attached brief. Petsonk Decl. at ¶ 8.

6. President Clinton forwarded his Clean Water Initiative, including the Administration's position on the groundwater-surface water issue, to the concerned congressional committees on February 1, 1994. Petsonk Decl. at ¶ 9. Prompt finalization of this brief following that submission was hampered somewhat by the weather-related closure of the Federal Government in Washington, D.C. on February 11. *Id.* at ¶ 10. The finalized brief is attached to this motion.

7. For the foregoing reasons, the United States respectfully requests that this Court grant our Motion for Extension of Time to file the attached *amicus curiae* brief stating the views of the United States in the above-referenced appeal. In accordance with Rule 26 of this Court,

counsel for the parties have been given notice by telephone of the United States' intent to file this motion prior to its filing.

Respectfully submitted,

/s/ Carol Annette Petsonk
LOIS J. Schiffer
Acting Assistant
Attorney General

THOMAS PAUL SCHNEIDER
United States Attorney
Eastern District of Wisconsin

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93-3380
February 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VILLAGE OF OCONOMOWOC LAKE, Plaintiff-Appellant, v. DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary, and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Defendants-Appellees.	Case No. 93-3380

DECLARATION OF CAROL ANNETTE PETSONK

I, Carol Annette Petsonk, declare as follows:

1. I am a Trial Attorney in the Policy, Legislation, and Special Litigation Section of the Environment and Natural Resources Division of the United States Department of Justice. I am admitted to the bar in the Commonwealth of Massachusetts and the State of Colorado. I assumed my current position on March 26, 1990.

2. I am generally familiar with the appellate litigation, *Village of Oconomowoc Lake v. Dayton-Hudson et al*, now pending in the Seventh Circuit Court of Appeals, a "citizens' suit" brought under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

3. The United States was originally a party to the lawsuit, and was dropped from the litigation by stipulation of the parties on August 26, 1993. Because the United States was dismissed from the action early on in the litigation, the United States was not required to file briefs on the issue in the Court of Appeals.

4. When the parties filed their briefs, the United States reviewed them to determine the appropriateness of filing an *amicus curiae* submission.

5. On the basis of this review, the United States determined that the current posture of the case, as well as perspectives unaddressed by the parties in their briefs, presented significant issues involving the interest of the United States in the effective enforcement of the Clean Water Act and the Clean Air Act.

6. At the time the parties concluded their briefing of this case, the Clinton Administration was involved in a process of developing positions on issues for the upcoming legislative debate on reauthorization of the Clean Water Act. This process culminated in the finalization on January 31, 1994 of President Clinton's Clean Water Initiative.

7. Among the issues included in the President's Clean Water Initiative was the issue of the relationship between groundwater and surface water.

8. The Department of Justice determined, as a legal and policy matter, that it would need to coordinate any position taken in an *amicus* brief on the groundwater-surface water issue in the *Village of Oconomowoc Lake v. Dayton-Hudson* litigation with the position taken on

groundwater-surface water issues in the President's Clean Water Initiative. Accordingly, our schedule on briefing in this case was necessarily delayed pending the President's finalization of his Initiative.

9. President Clinton's Clean Water Initiative was made public and transmitted to the relevant congressional committees on February 1, 1994.

10. Immediately following the transmittal to Congress of the President's Clean Water Initiative, the Environment and Natural Resources Division sought to finalize an *amicus* brief for submittal to this court in the above-referenced appeal. The statements in the President's Initiative concerning the groundwater-surface water relationship provided the basis for the legal standard articulated in the attached Brief of the United States as Amicus Curiae, at page 13. Our finalization of the brief, however, was hampered by a spate of inclement weather that resulted in shutdowns of the Federal Government in Washington, D.C. The most recent shutdown occurred Friday, February 11, 1994.

11. In accordance with Rule 26 of this Court, I have notified counsel for the parties by telephone of the United States' intent to file a Motion for Leave to File *Amicus Curiae* Brief Out of Time prior to the filing of said motion. Specifically, on February 14, 1994, I informed Messrs. William S. Roush, Jr., Friebert, Finerty & St. John, attorney for Plaintiff-Appellant; Paul G. Kent, DeWitt Porter, attorney for Defendant-Appellee Target Stores, and for Intervenor-Appellee City of Oconomowoc; and John S. Greene, Assistant Attorney General, State of Wisconsin, attorney for Defendant-Appellants George E.

Meyer and Wisconsin Department of Natural Resources, by telephone on February 14, 1994, of the United States' intention to file the Motion and *amicus curiae* brief.

I declare under penalty of perjury that the foregoing is a true and correct statement.

February 14, 1994
Date:

/s/ Carol Annette Petsonk
Carol Annette Petsonk,
Attorney

United States Court Of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

APPEARANCE FORM

Appellate Court No.: 93-3380
Short Caption: Village of Oconomowoc Lake v. Dayton-Hudson
District Court Judge: John W. Reynolds, Eastern District of Wisconsin
District Court No.: Civ. No. 93-C-0797

****

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

United States of America as the
(party name)

[ ] appellant(s) [ ] appellee(s) [XX] amicus curiae
[ ] petitioner(s) [ ] respondent(s) [ ] intervenor(s)

Verify that the address and firm (if any) information is accurate. If incorrect, strike through the incorrect information and record it correctly:

*** ~~Admitted to Appellate Court~~	~~Lead Counsel~~	~~Not Involved~~
~~Y N~~	~~Y N~~	_____

***Pursuant to Circuit Rule 46(c), attorneys for the federal government may appear before this court in connection with their official duties without being formally admitted to practice before the court.

1) Name: Carol Annette Petsonk, Ellen Durkee
Firm, Office or Facility: Department of Justice
Unit, Division or Section: Environment & Natural Resources Division
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You must sign to either enter your appearance or indicate your non-involvement and return this form within 10 days of docketing this appeal. Failure to do so will result in your name being stricken from the Clerk's records in this appeal. A "Certificate of Interest" pursuant to Circuit Rule 12(d) must also accompany this form if you intend to participate in this case.

1) Carol Annette Petsonk Printed Name	2) Ellen Durkee Printed Name	3) _____ Printed Name
1) /s/ Carol Annette Petsonk Signature	2) /s/ Ellen Durkee Signature	3) /s/ ___ Signature

If above counsel will not be participating in this case, but other counsel from the firm will appear, or additional counsel from the firm will be participating with you, the attorneys' printed names with signatures should appear below

Name_____ Signature_____ Admitted?
Y—— N—— Lead? Y—— N——

Name_____ Signature_____ Admitted?
Y—— N—— Lead? Y—— N——

Name_____ Signature_____ Admitted?
Y—— N—— Lead? Y—— N——

---

*Only one counsel per firm may be designated as "Lead Counsel" and that counsel must be admitted to this Court within 30 days of docketing, per Circuit Rule 46(a).

(1076-021992)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3380

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON-HUDSON CORPORATION;
GEORGE E. MEYER, Secretary; and
the WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 25, Fed. R. App. P., I have served a copy of the following:

1. Motion of the United States for Leave to File Out of Time an *Amicus Curiae* Brief. The Declaration of Carol Annette Petsonk is attached to the Motion; and

2. Brief of the United States as *Amicus Curiae,*

by overnight mail, this 14th day of February, 1994, on:

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No. 93-3380

IN THE UNITED STATE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary; and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
THE HONORABLE JOHN W. REYNOLDS, PRESIDING

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3380

VILLAGE OF OCONOMOWOC LAKE,

Plaintiff-Appellant,

v.

DAYTON-HUDSON CORPORATION; GEORGE E. MEYER, Secretary; and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINION BELOW

The unreported decision of the district court (Honorable John W. Reynolds, District Judge) was issued September 24, 1993.

SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The complaint predicated the subject matter jurisdiction of the district court on 28 U.S.C. §§ 1331, 1361, 2201,

and 2202; 33 U.S.C. § 1365; and 42 U.S.C. § 7604. (App. 8) The judgment entered on September 24, 1993 was final as to all issues and parties. (App. 7) The notice of appeal was filed on September 24, 1993. (App. 7) This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATUTES INVOLVED

This appeal involves the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

STATEMENT OF ISSUES

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29 of this Court, the United States of America submits this memorandum on the following issues:

> (1) Whether the discharge of pollutants to groundwater, in certain circumstances, may be subject to the CWA prohibition against unpermitted point source discharges of pollutants to waters of the United States.
>
> (2) Whether State Implementation Plan (SIP) provisions, approved by EPA pursuant to Part D of the CAA, that regulate "indirect sources" of air pollution, are enforceable by citizens under CAA section 304(a)(3).

The United States has a direct interest in the development of the law regarding citizen enforcement under the CWA and CAA because citizens play a major role in the integrated federal-state-citizen enforcement scheme

under these statutes. Moreover, the United States is concerned that district court's erroneous reasoning, if not corrected on appeal, could undermine federal enforcement of these laws. Accordingly, the United States requests that the judgment of the district court be reversed and the case remanded to that court for further proceedings.

STATEMENT OF THE CASE

Plaintiffs, Village of Oconomowoc Lake and Town of Summit, Wisconsin, brought suit on July 30, 1993, against the Dayton-Hudson Corporation, the Wisconsin Department of Natural Resources and its Secretary, George E. Meyer, and the United States Environmental Protection Agency (EPA) and its Administrator and Regional Administrator, alleging that defendants had failed to obtain or issue permits required under the CWA and the CAA in connection with Dayton-Hudson's proposed construction of a merchandise distribution center for its Target Department store chain. The federal defendants were dropped from the litigation by stipulation of the parties on August 26, 1993.

The district court dismissed plaintiffs' CWA claim in an opinion issued September 24, 1993. The district court held that since plaintiffs had alleged that Dayton-Hudson's proposed facility would discharge pollutants to waters of the United States via groundwater, rather than directly to surface water, no National Pollution Discharge Elimination System (NPDES) permit could be required

under the CWA. *Village of Oconomowoc Lake et al. v. Dayton-Hudson et al.*, No. 93-C-0797, slip opinion at 7 (E.D. Wisc. Sept. 21, 1993).

The district court also dismissed plaintiffs' CAA claim. Plaintiffs had claimed that Dayton-Hudson was required to obtain a "major source" CAA permit for its facility under portions of the Wisconsin SIP regulating "indirect sources" of air pollution such as parking lots and other attractors of mobile source pollution. Plaintiffs had filed suit under a portion of the citizen suit provision of the CAA, section 304(a)(3) of the CAA, 42 U.S.C. § 7604(a)(3), which provides that citizens may bring suit against any person who proposes to construct or constructs any new or modified major emitting facility without a permit "required under" specific parts of the CAA. The district court found that plaintiffs could not invoke Section 304(a)(3) because permits for indirect sources are not "required under" the CAA.

On September 24, 1993, the Village of Oconomowoc Lake appealed the district court's judgment. The case has been fully briefed by the parties. Oral argument is set for February 16, 1994.

STATEMENT OF FACTS

The statement of the facts is provided in the briefs of the parties.

RELATED CASES AND PROCEEDINGS

These are provided in the briefs of the parties.

STANDARD OF REVIEW

The standard of review is stated in the brief of the Appellant.

ARGUMENT

I.

DISCHARGES OF A POLLUTANT TO GROUNDWATER ARE WITHIN CWA JURISDICTION IN SPECIFIC CIRCUMSTANCES

A discharge of a pollutant to groundwater comes within Clean Water Act (CWA) jurisdiction where the discharge is tantamount to a discharge to waters of the United States. In such circumstances, under Sections 301(a) and 402 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a) and 1342, a point source discharge of a pollutant to ground or to groundwater is subject to CWA regulation. Whether these circumstances exist in any particular case is a question of fact. The lower court, however, erroneously assumed that as a matter of law, point source discharges to groundwater may never be subject to CWA permitting jurisdiction; on that basis, it dismissed plaintiffs' CWA claim.

Citizen suit plaintiffs "should have the opportunity to demonstrate through expert testimony that any seepage of pollutants . . . into groundwater" is effectively a discharge into surface waters. *See McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431, 437 (E.D.Cal. 1989), *appeals docketed*, Nos. 91-16308, 91-16467 (9th Cir. Aug. 23, 1991). This Court should reverse the

judgment of the district court on the CWA claim and remand the claim to the lower court for further examination of the factual circumstances.

A. The majority of cases recognize that discharges to groundwater may, in specified circumstances, come within Clean Water Act regulatory jurisdiction.

This Court has expressly recognized the possibility that point source discharges to groundwater may be subject to regulation under the CWA where the groundwater is hydrologically connected to surface waters. In the *Inland Steel* case, this Court stated that "the legal concept of navigable waters *might include* ground waters connected to surface waters – though whether it does or not is an unresolved question." *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990) (emphasis added).

The majority of courts have refused to rule out the possibility that discharges of pollutants to groundwater can come within the regulatory compass of the CWA. Most recently, in *Sierra Club v. Colorado Refining Company (CRC)*, 838 F. Supp. 1428 (D. Colo. 1993), plaintiffs alleged that pollutants discharged from a point source were entering surface waters via groundwater. The court found these allegations sufficient to withstand a motion to dismiss:

> I therefore find that Sierra Club's allegations that CRC has and continues to discharge pollutants into the soils and groundwater beneath the refinery which then make their way to Sand Creek through the groundwater state a cause of action under the Clean Water Act. Accordingly, I

deny CRC's Rule 12(b)(6) motion to dismiss the first cause of action.

Sierra Club v. CRC, slip op. at 17-18.

Although *Sierra Club v. CRC* is, to our knowledge, the only case other than the present one to confront the question squarely in the context of a motion to dismiss, all but one of the other courts that have considered the issue have specifically held out the possibility that NPDES permits may be required in specific circumstances for discharges to groundwater where the groundwater is connected to waters of the United States. In *Inland Steel, supra*, this Court suggested that "a well that ended in such connected ground waters might be within the scope of the [Clean Water] Act." *Id.*, 901 F.2d at 1423 (7th Cir. 1990) (citations omitted). Although the Court of Appeals for the Fifth Circuit has indicated that an NPDES permit is not required for discharges of pollutants into *isolated* groundwaters because those groundwaters are not waters of the United States, it "express[ed] no opinion" on what the result would be under the CWA if the contaminated groundwater migrated to navigable waters. *Exxon v. Train*, 554 F.2d 1310, 1312 n. 1 (5th Cir. 1977). And in *Kelley v. United States*, No. 79-10199 (E.D. Mich. Oct. 28, 1980) ("*Kelley I*"), the district court found that wastes migrating from groundwater under an air base into nearby surface waters could fall within CWA jurisdiction. *See Sierra Club v. CRC, supra*, slip op. at 12 (discussing *Kelley I*).

In *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1193-96 (E.D.Cal. 1988) ("*MESS I*"), the

district court concluded that some discharges to groundwater could fall within the regulatory purview of the CWA if the groundwater is "naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act." 707 F. Supp. at 1196. In a later phase of the *MESS* litigation, after defendant presented testimony showing the "naturally connected" standard was not met, the court elaborated a more detailed standard, holding that the CWA encompasses discharges to groundwater where it is "reasonably foreseeable and temporally imminent" that the discharges will percolate to surface waters. *MESS II, supra,* 763 F. Supp. at 437.[1]

Only in *Kelley v. United States,* 618 F. Supp. 1103, 1106-7 (W.D. Mich. 1985) ("*Kelley II*") did a district court hold that CWA jurisdiction did not extend to the alleged release of toxic chemicals into groundwater that allegedly was migrating into a bay. The other authorities cited are better-reasoned than *Kelley II* and the court below. Thus, this Court should hold, as a matter of law, that discharges

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[1] In *New York v. United States,* 620 F. Supp. 374 (E.D.N.Y. 1985), the court "decline[d] to reach defendants' argument as to the scope of section 301 [of the CWA] as applied to groundwaters, since it is clear that plaintiff has alleged that the pollutants threaten to contaminate [various creeks], all of which are indisputably navigable waters." *Id.* at 381. And, *Quivira Mining Co. v. United States EPA,* 765 F.2d 126, 129-130 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986), affirmed EPA's decision that a CWA permit was required for discharges of pollutants into surface arroyos which, during storms, channelled rainwater both directly to navigable-in-fact streams and into underground aquifers that connected with such streams.

of pollutants to groundwaters may fall within the regulatory jurisdiction of the CWA, depending on the factual circumstances.

B. EPA's view is in accord with the majority of caselaw and is entitled to Chevron deference.

Section 402 of the CWA authorizes states to administer permit systems for the discharge of pollutants. "Discharge of a pollutant" is defined as any addition of pollutants "to navigable waters from a point source." 33 U.S.C. § 1362(12). The statute defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The CWA distinguishes between and refers separately to navigable waters and ground waters. *See* 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1).[2] Thus, *isolated* groundwaters are not "navigable waters", and discharges to groundwaters *per se* are not covered by the CWA permitting scheme. The statute does not explicitly address, however, whether the prohibition on unpermitted discharges includes the addition of pollutants to navigable waters from a point source through groundwater.

The legislative history is similarly inconclusive on this point. Congress specifically considered – and rejected

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[2] The legislative history of the CWA also demonstrates that "Congress did not intend groundwater and navigable waters to be synonymous." *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1194 (E.D.Cal. 1988) ("*MESS I*"); *see also United States v. GAF Corporation*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975).

– extension of the NPDES program to all groundwater.[3] There is no evidence, however, that rejecting this extension, Congress intended to create a groundwater loophole through which discharges of pollutants could flow, unregulated, to surface water. The legislative debated [sic] coalesced around an amendment introduced by Representative Aspin, that would have extended CWA regulatory jurisdiction to all discharges to groundwater. A review of the debate illustrates that Congress was primarily concerned with the Aspin amendment's extension of CWA jurisdiction to groundwater *per se* including isolated groundwater. For example, Rep. McClory, arguing in favor of the Aspin amendment, stated, "to consider that we are providing for the protection of the surface waters . . . and omitting from the strong provisions of this measure – vast groundwater supplies – is to my mind unthinkable". 118 Cong. Rec. 10668 (1972) (remarks of Rep. McClory). Rep. Sisk objected to the Aspin Amendment because, in his view, "what they are attempting to do here is bring groundwater under the control of the EPA." 118 Cong. Rec. 10669 (1972) (remarks of Rep. Sisk).[4]

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[3] *See Exxon Corp., supra*, 554 F.2d at 1326-1329 (reviewing legislative history); *MESS I*, 707 F. Supp. at 1194.

[4] *See also* 118 Cong. Rec. 10668 (1972) (remarks of Rep. Harsha) ("[T]his amendment purports to require water-quality standards for groundwater"). Rep. Aspin himself was concerned not only with pollution of isolated groundwater, but with hydrologically connected groundwater as well:

> If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.

118 Cong. Rec. 10666 (1972) (remarks of Rep. Aspin). The tenor of the debate indicates, however, that the representatives were most concerned with application of the NPDES program to the

Congress ultimately rejected the Aspin amendment. But there is no evidence that Congress intended to throw jurisdiction over affected surface waters out with the groundwater.

Since the plain language and legislative history do not answer definitively the precise question presented here, a reviewing court should defer to the views of the EPA, the agency charged with administering the CWA. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984). EPA's interpretation of the CWA, including the jurisdictional limits of the NPDES requirements, are entitled to deference. *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S. Ct. 1046, 1056 (1992). As recognized in *Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992), the determination whether a discharge to "waters of the United States" includes discharges to hydrologically connected groundwaters should be left in the first instance to the discretion of the EPA, "since such a determination ultimately involves an ecological judgment about the relationship between surface waters and groundwaters." *Id.*, 968 F.2d at 1451 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (deference should be given to administering agency's ecological judgment about the relationship between wetlands and adjacent surface waters)).

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nation's vast and isolated groundwater reserves. *See generally Exxon v. Train, supra*, 554 F.2d at 1326-1329 (reviewing legislative history); *and see* Mary Christina Wood, "Regulating Discharges into Groundwater: The Crucial Link in Pollution Control under the Clean Water Act," 12 Harv. Envtl. L. Rev. 569, 613-614 (1988).

EPA has repeatedly expressed its view that the CWA encompasses discharges to groundwaters that are hydrologically connected to waters of the United States. For example, EPA explained this interpretation when it promulgated regulations on storm water discharges. *See* Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule, 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) ("[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)").[5]

EPA also interpreted the statute in this way when it promulgated regulations governing discharges from animal feedlots. *See* NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region 6 Public Notice of Final Permitting Decision, 58 Fed. Reg. 7610, 7631 (Feb. 8, 1993) (feedlots required to obtain NPDES permit for discharges to groundwater unless permittee can demonstrate lack of hydrologic connection to surface water).

EPA's statement of its position in connection with the promulgation of other recent regulations is particularly instructive:

> Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and

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[5] *See Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (upholding rule, remanding on other grounds).

> most courts addressing the issue have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated *because such discharges are effectively discharges to the directly connected surface waters.*"

Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 Fed. Reg. 64, 876, 64, 892 (Dec. 12, 1991) (emphasis added).

This Court should defer to EPA's scientific judgment in the complex area of groundwater-surface water relationships and hold that the discharge of pollutants to groundwaters may come within CWA jurisdiction, depending on the circumstances.

C. Discharges to groundwater come within CWA regulatory jurisdiction where there is a reasonably foreseeable direct hydrological connection between the groundwater and the surface waters in the proximity of the release, and a greater than de minimis quantity of pollutants reasonably is able to reach the surface water.

As noted above, a discharge to groundwater comes within the CWA's regulatory compass when the discharge is tantamount to a discharge to waters of the United States. This occurs when there is a reasonably foreseeable direct hydrological connection to waters of the United States in the proximity of the release, and a greater than

de minimis quantity of the pollutant reasonably is able to reach the waters of the United States (provided that no other Federal statute directly addresses the activity causing the release).

It bears emphasizing that EPA does not take the position that groundwaters themselves are "waters of the United States" within the meaning of the CWA. Rather, the mere fact that groundwaters are not waters of the United States does not mean that discharges of pollutants to groundwaters can never be regulated discharges within the meaning of the CWA. Such discharges are regulated by the CWA where the discharge to groundwater is effectively a discharge to waters of the United States. Thus, where there is a reasonably ascertainable direct hydrological connection to surface waters in the proximity of a release of pollutants, and it is reasonably foreseeable that pollutants discharged into groundwater will reach surface waters in greater than *de minimis* quantities, CWA jurisdiction attaches (provided, of course, that no other Federal statute directly regulates the release or the activity causing the release).

The United States recognizes that expert analysis of hydrological conditions may be required in order to determine whether this standard has been met. Precisely because such factual determinations may be required, it is inappropriate to dismiss a CWA complaint simply because the plaintiff alleges that pollutants will flow to waters of the United States via groundwater. Accordingly, the judgment of the district court should be reversed. The case should be remanded to the lower court for further

factual examination to determine whether, under this standard, CWA jurisdiction is properly invoked.[6]

II.

INDIRECT SOURCE PERMIT REQUIREMENTS APPROVED INTO STATE IMPLEMENTATION PLANS TO SATISFY REQUIREMENTS OF PART D OF THE CLEAN AIR ACT ARE ENFORCEABLE BY CITIZENS UNDER SECTION 304(A)(3) OF THAT ACT

The district court concluded that because defendant Dayton-Hudson's distribution center will cause air pollution only indirectly, and because EPA may not require states to include indirect source review programs in SIPs, EPA could not have required Wisconsin to include in its SIP a program requiring the distribution center to obtain a permit. *Village of Oconomowoc Lake v. Dayton-Hudson*, slip op. at 4-5. The court held that Section 304(a)(3) of the CAA, 42 U.S.C. § 7604(a)(3), does not provide jurisdiction over citizen suits alleging a failure to issue or obtain a permit required under a SIP if the permit requirement is not specifically mandated under the CAA itself. Slip op. at 5-6.

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[6] In this case, appellant seeks prospectively to prevent discharges to groundwater. The record indicates that the distribution center is still under construction, and the citizens have not alleged that any discharges to groundwater in violation of the CWA have occurred. Appellants have argued that the CWA does not provide a basis for prospective enforcement jurisdiction. On remand, after conducting the factual inquiry described above, the district court may need to consider whether the CWA affords a basis for prospective jurisdiction.

Section 304(a)(3) of the CAA provides:

> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf – * * * *
>
> > (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit *required under* part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) . . .

42 U.S.C. § 7604(a)(3) (emphasis added). The district court reasoned that Section 304(a) (3)'s phrase, "required under", limits jurisdiction to challenges alleging violation of requirements to obtain a permit stated in the CAA itself.

The district court's conclusion is overly broad. The correct reading of Section 304(a)(3) is that citizen suits will lie to enforce all permit requirements approved by EPA into a SIP under Part D of Title I of the CAA. The court should have construed the Section 304(a) (3) reference to permits "required under . . part D of subchapter I" to include permits *required under the implementation plan of a state* by virtue of EPA's approval (or promulgation) of the plan pursuant to Part D.[7]

This construction is the one adopted by EPA, the agency charged with administering the CAA, in its regulations governing approval of SIPs. There, EPA takes the

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[7] The statute, and the analysis in this brief, apply as well to permits required under Part C of subchapter I of the CAA, but Part C is not at issue in this case.

position that all provisions of an applicable SIP are federally enforceable, regardless of their provenance:

> (xiv) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, *requirements within any applicable State implementation plan*, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

40 CFR § 51.165(a)(1)(xiv) (emphasis added). Thus, EPA has authority to enforce all SIP provisions – including indirect source review requirements – approved by it under Part D, even though such requirements are not mandated by the CAA.

Interpreting the Section 304(a)(3) citizen suit provision to omit coverage of such requirements would strain the balance of the integrated statutory scheme of the CAA. It would also fail to recognize that, beyond a relatively small number of federally mandated specific requirements, Congress gave states broad discretion to fashion appropriate air pollution control measures to meet their SIP obligations. See CAA Section 110 (a)(2)(A), 42 U.S.C. § 7410(a)(2)(A).

Moreover, such an interpretation would leave a significant hole in citizen enforcement, and require a reviewing court in every Section 304(a)(3) citizen suit to trace

the pedigree of each SIP provision back to the parent CAA in order to determine whether the provision was mandated by the Act and thus could be enforced in federal court. There is no evidence in the statute or the legislative history to indicate that Congress intended such a strained result.

A. Caselaw supports the proposition that citizens may sue under CAA Section 304(a)(3) to enforce SIP indirect source provisions.

While there is no direct precedent addressing the precise question whether citizen suits under Section 304(a)(3) will lie to enforce indirect source review requirements contained in state plans approved by EPA under Part D, the tenor of the caselaw indicates that such suits should be allowed as part of the integrated CAA statutory scheme. Only one court of appeals has addressed the question, and it specifically saw some ambit for citizen enforcement. In *Sierra Club v. Larson*, 2 F.3d 462, 469 (1st Cir. 1993), the Court of Appeals held that Massachusetts SIP provisions on indirect sources can, in certain cases, be enforceable by citizen suit under Section 304(a)(3):

> "Of course, not every state-law restriction on a project is a matter of federal concern, but a state restriction that is part of a federally approved state implementation plan under the Clean Air Act *may at least in some circumstances be within the purview of a citizens suit under 42 U.S.C. § 7604.*"

Sierra Club v. Larson, 2 F.3d at 469 (emphasis added) (construing section 304(a)(3)). The court did not decide

the question definitively in *Larson* because the relevant provision of the state SIP had not yet been approved by EPA. *Id.* at 469-470.

In a number of other cases, courts have held that indirect source review provisions can constitute an "emissions standard or limitation" within the meaning of section 304(a)(1) of the CAA.[8] While these cases are not dispositive of the issue on appeal, they do support the proposition that the CAA's integrated enforcement scheme allows for citizen enforcement of indirect source requirements approved into a SIP under Part D.[9]

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[8] *See, e.g., Coalition Against Columbus Center v. City of New York*, 967 F.2d 764, 771 (2d Cir. 1992); *Citizens for a Better Environment v. Deukmejian*, 731 F. Supp. 1448, 1454 (N.D. Cal. 1990); *Delaware Valley Citizens Council v. Davis*, 932 F.2d 256, 264-67 (3d Cir. 1991); *American Lung Association v. Kean*, 871 F.2d 319, 321-324 (3d Cir. 1989). CAA Section 304(a)(l) provides that any person may commence a civil action against any person who is "alleged to have violated . . . or to be in violation of (A) *an emission standard or limitation under this chapter* or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 7604(a) (1) (emphasis added).

[9] The citizen suit provisions of Section 304 parallel the federal enforcement authorities of Section 113. EPA's general SIP enforcement authority is contained in Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), which requires 30 days notice to the person alleged to be in violation before a suit may be filed. However, in recognition of the exigencies surrounding violations of new source permitting requirements, Section 113(a)(5) of the CAA, 42 U.S.C. § 7413(a) (5), allows the Administrator to bring suit without issuing a 30 day notice whenever a state fails to comply with new source permitting requirements. Similarly, Section 304(a)(1), 42 U.S.C. § 7604(a)(1), allows citizens to file suit regarding SIP violations only after giving 60 days advance

These cases are particularly important in view of the district court's misinterpretation of the distinction between Sections 304(a)(1) and 304(a)(3). The district court interpreted Section 304(a)(3) as having a narrower scope than Section 304(a)(1). The proper distinction between these provisions, however, relates not to the question whether a particular SIP provision is mandated by federal law, but whether EPA approved the SIP provision under the authority of the new source permitting requirements of Part D of the CAA.

B. The case should be remanded to the lower court for further determination regarding the Wisconsin SIP indirect source review provisions for emissions of NOx.

Appellee State of Wisconsin has raised the argument that the specific Wisconsin SIP provisions invoked by appellant have not yet been approved by EPA. It is true that the recent proposed SIP revisions submitted by the State of Wisconsin to EPA, Wis. Admin. Code § NR 408.02(21)(b)3. (1992), have not been approved by EPA, and thus cannot be enforced in a citizen suit. However, any existing SIP requirements for indirect source review are enforceable by citizens under Section 304(a)(3) if the requirements were approved by EPA under Part D. The record in this case is not sufficient to determine whether

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notice to the Administrator, the affected state, and the alleged violator, *see* Section 304(b)(1)(A), 42 U.S.C. § 7604(b)(1)(A), while Section 304(b) in its entirety pointedly omits this advance notice requirement for suits brought under Section 304(a)(3). *See* 42 U.S.C. § 7604(b)(1)(A).

Wisconsin's indirect source review requirements were approved into its SIP pursuant to Part D, and if so, whether they mandate permit distinctions between "major" and "minor" indirect sources of NOx. The United States therefore respectfully suggests that this Court remand the CAA claim to the lower court for it to make these determinations. While remand would entail some delay for review of an extensive administrative record that is nearly fifteen years old, the need for integrated enforcement of the CAA mandates that citizens be allowed under CAA Section 304(a) (3) to enforce all indirect source review requirements contained in a state's implementation plan. To hold otherwise would be to create an unwarranted gap in the CAA's comprehensive federal, state, and citizen enforcement scheme.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case should be remanded to the district court.

Respectfully submitted,

/s/ Carol Annette Petsonk
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April 22, 1993

Mr. Keith Beneke
Witcher Construction
9855 West 78th Street, Suite 270
Minneapolis, MN 55344

Received April 28, 1993

SUBJECT: Storm Water Discharge Construction Permit Target Distribution Center – Oconomowoc

Dear Mr. Beneke:

This letter is to confirm our receipt of the Notice of Intent (NOI) you filed for the proposed construction of a Target distribution center in the City of Oconomowoc on April 9, 1993. The NOI is an application for coverage under the State of Wisconsin's proposed permit for construction sites five acres or larger. As you are already aware, the State of Wisconsin is in the process of implementing a storm water discharge control program in accordance with federal regulations.

The construction site erosion control general permit will be used to cover appropriate construction site applicants. The general storm water permits will contain requirements for preventing and minimizing storm water pollution. I have enclosed a fact sheet that briefly outlines

33 U.S.C. § 1342

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the

State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

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33 U.S.C. § 1362

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of

the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

42 U.S.C. § 7604. Citizen suits [CAA § 304]

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf –

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

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33 U.S.C. § 1365. Citizen suits [FWPCA § 505]

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

> (1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief

(including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[1]

(g) Citizen

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the

---

[1] So in original.

Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

---

40 C.F.R. § 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that a State which chooses not to administer a sludge management program pursuant to section 405(f) of the CWA as part of its NPDES program is not required to have legal authority to implement the portions of the following provisions which were promulgated after the enactment of the Water Quality Act of 1987 (Pub. L. 100-4) and which govern sewage sludge use and disposal. In all cases, States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

* * *

(9) § 122.26 – (Storm water discharges):

National Pollution Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations (U.S. EPA Region 6 Final Permitting Decision), 58 Fed. Reg. 7610, 7623, 7631 (U.S. EPA, February 8, 1993):

> **Summary:** Pursuant to sections 301, 304(b) and (c), and 308(b) and (c) of the Clean Water Act (CWA) 40 CFR 122.23 defines concentrated animal feeding operations as point sources subject to the NPDES permit program.
>
> * * *
>
> Many comments questioned the requirement of liners to protect from hydrologic connection. Many commenters believed that this requirement was to protect ground water. Over most of EPA Region 6 surface water flow is sustained throughout much of the year by groundwater inflow. As a result, contaminants which leak from containment structures to the ground water will typically move underground toward local streams and rivers where they will be discharged and affect water quality. EPA has included a liner requirement specifically where there is potential for pond leakage to impair surface waters. Region 6 strongly believes this is consistent with the effluent guideline requirement of "no discharge" technology. It is EPA's position that a discharge through the bottom of the retention structure constitutes a violation of the required technology requirement if significant pollutants from that discharge reach a surface water. Also, see answer D.4.
>
> * * *

> (H) *Liner Requirement.* The permittee shall include in the plan, site specific documentation that no significant hydrologic connection exists between the contained wastewater and surface waters of the United States. Where the permittee cannot document that no significant hydrologic connection through ground water exists, the ponds, lagoons and basins of the retention facilities must have a liner which will prevent the potential contamination of surface waters.

Amendments to the Water Quality Standards Regulation That Pertains to Standards on Indian Lands (Final Rule), 56 Fed. Reg. 64876, 64892 (U.S. EPA, December 12, 1991):

> *Response:* Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered to be "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.

National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges (Final Rule), 55 Fed. Reg. 47990, 47996, 47997 (U.S. EPA, November 16, 1990):

This regulation covers discharges of storm water associated with industrial activity and discharges from municipal separate storm sewer systems serving a population of 100,000 or more into waters of the United States. Therefore, discharges from basins that are part of a conveyance system for a storm water discharge associated with industrial activity or part of a municipal separate storm sewer system serving a population of 100,000 or more are covered by this regulation. Flows which are channeled into basins and which do not discharge into waters of the United States are not addressed by today's rule.

* * *

EPA intends to embrace the broadest definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States.

147.021. Storm water discharge permits

(1) Requirement. An owner or operator shall obtain a permit under this section for any of the following:

(a) A discharge from a discernible, confined and discrete conveyance of storm water associated with an industrial activity, including construction, that meets criteria in rules promulgated by the department.

SIERRA CLUB, a nonprofit corporation,
Plaintiff-Appellee,

v.

COLORADO REFINING COMPANY,
a Colorado corporation,
Defendant-Appellant,

COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT LIQUID TERMINALS ASSN, ACME METALS, INC., AMERICAN CYANAMID CO., APACHE CORP., CONSOLIDATED RAIL CORP., CYPRUS-AMAX, INC., DRESSER INDUSTRIES, INC., GAF CORP., MURPHY OIL USA, INC., SHELL OIL CO., STAUFFER MANAGEMENT CO., U.S. STEEL GROUP, a division of USX Corp.; WITCO CORP., Amici Curiae.

SIERRA CLUB v. COLORADO REF. CO.

No. 94-1062

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

1994 U.S. App. LEXIS 15183
June 20, 1994, Filed

NOTICE:[1] THIS ORDER AND JUDGMENT IS NOT BINDING PRECEDENT, EXCEPT UNDER THE DOCTRINES OF LAW OF THE CASE,

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order. 151 F.R.D. 470 (10th Cir. 1993).

RES JUDICATA, AND COLLATERAL ESTOPPEL. THE COURT GENERALLY DISFAVORS THE CITATION OF ORDERS AND JUDGMENTS; NEVERTHELESS, AN ORDER AND JUDGMENT MAY BE CITED UNDER THE TERMS AND CONDITIONS OF THE COURT'S GENERAL ORDER FILED NOVEMBER 29, 1993, 151 F.R.D. 470.

PRIOR HISTORY: (D.C. No. 93-K-1713). (D. Colo.)

Before KELLY and BARRETT, Circuit Judges, and O'CONNOR, District Judge.[2]

OPINION BY: PAUL J. KELLY, JR.

OPINION:
ORDER AND JUDGMENT*

This appeal presents no [*2] live case or controversy. The denial of Colorado Refining's (CRC) Fed. R. Civ. P. 12(b)(6) motion in no way precludes it from making such a motion on the same grounds, should it need to in a future case; neither does the denial of a Rule 12(b)(6) motion establish any binding precedent. The mere fact that CRC may be sued again for violations of the Clean Water Act does not confer jurisdiction upon us, making any opinion in this case advisory.

Accordingly, this interlocutory appeal is dismissed as improvidently granted.

APPEAL DISMISSED.

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[2] The Honorable Earl E. O'Connor, Senior United States District Judge for the District of Kansas, sitting by designation.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

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(2)

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-304

In The

Supreme Court of the United States

October Term, 1994

THE VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS CITY OF OCONOMOWOC AND TARGET STORES, A DIVISION OF DAYTON HUDSON CORPORATION IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner has improperly framed the issue on review based upon dicta contained in the Seventh Circuit Court of Appeals' decision that discharges to groundwater are not covered by the Clean Water Act. The question presented for review actually concerns whether this Court has jurisdiction where Petitioner failed to comply with the 60-day notice requirements contained in the Clean Water Act, 33 U.S.C. § 1365. Accordingly, the question presented for review is as follows:

> Does a federal court have subject matter jurisdiction pursuant to the Clean Water Act over a citizen suit action when the complainant fails to provide adequate notice pursuant to 33 U.S.C. § 1365(b)?

LIST OF PARTIES

Respondents, City of Oconomowoc and Target Stores, a division of Dayton Hudson Corporation,[1] object to Petitioner's "Statement Naming Additional Parties." Supreme Court Rule 24.1(b) requires Petitioner to include "[a] list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the caption of the case in this Court contains the name of all parties."

In the guise of complying with Supreme Court Rule 24.1(b), Petitioner has referenced and included a proposed *amicus curiae* brief written by the United States Environmental Protection Agency ("EPA") which is not part of the record on review. As acknowledged by Petitioner in its "Statement Naming Additional Parties," the referenced brief was refused by the Seventh Circuit Court of Appeals and was not filed in this proceeding. (Petition ii)[2]

It is a well-established principle of Supreme Court procedure that attempts should not be made to submit additional or different evidence that is not part of the record on review. *Russell v. Southard*, 12 How. 139, 158,

---

[1] Dayton Hudson Corporation is a publicly held corporation engaged in the retailing of merchandise. Dayton Hudson Corporation operates the following retail stores throughout the United States: Target, Marshall Fields, Dayton's, Mervyn's and Hudsons. This information is being submitted pursuant to Supreme Court Rule 29.1.

[2] References to Petitioner's Writ of Certiorari are designated as (Petition ___).

LIST OF PARTIES – Continued

159 (1851); *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 (1970). Indeed, the American Bar Association has gone so far as to label such efforts "unprofessional conduct." The Prosecutor Function Standard 3-5.9; The Defense Function Standard 4-7.9 (2d ed. 1979).

Apart from Petitioner's unwarranted and wholly improper reference to the proposed *amicus curiae* brief of the EPA, Respondents agree with Petitioner's "Statement Naming Additional Parties."

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STATUTES INVOLVED

33 U.S.C. § 1365

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the

> **Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or**
>
> **(B)** if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
>
> (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. (emphasis added)

STATEMENT OF THE CASE

Procedural History

This case is one of twenty (20) legal proceedings initiated by the Village of Oconomowoc Lake ("the Village") and others to stop the development of the Target Midwest Regional Distribution Center ("Target Center") in an industrial park in the City of Oconomowoc, Wisconsin. (R.1, 29) This action was filed on July 30, 1993 after the Village had been unsuccessful in obtaining relief from several Wisconsin state administrative agencies, county

circuit courts, the Wisconsin Court of Appeals and the Wisconsin Supreme Court. (R.29)

The Complaint originally named Dayton Hudson Corporation, the Wisconsin Department of Natural Resources ("DNR") and its Secretary, and the United States Environmental Protection Agency ("EPA") its Administrator and Regional Administrator as defendants. (R.1) The City of Oconomowoc ("City") was allowed to intervene as a defendant by the district court because the Target Center will create 700 jobs and generate $800,000 in annual tax revenue for the City when fully operational. (R.25, 30:398) On August 26, 1993, the Village voluntarily dismissed all of the federal defendants. (R.36)

The Complaint alleged that the DNR improperly applied Wisconsin law when it issued Target an indirect source air permit and when it authorized Target to discharge stormwater runoff to the groundwater underlying the facility. (R.1.) The Village alleged that these decisions of the DNR gave rise to claims under the federal Clean Air Act and Clean Water Act. *Id.* The district court disagreed. (R.56; Pet. A. 20a)[3]

On August 11, 1993, the district court, like numerous state courts before it,[4] denied the Village's motion for

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[3] References to the Appendix of Petitioner's Writ of Certiorari are designated as (Pet. A. ___). References to the Appendix of Respondents' Brief in Opposition are designated as (Resp. A. ___). References to the Record are designated as (R.___).

[4] The Petitioner has requested injunctive relief from various tribunals at least 17 times. Each request for injunctive relief has been rejected. See, Joint Memorandum of the City of Oconomowoc and Target Stores Opposing Motion for Injunctive

temporary injunctive relief. (R.13, 34) Subsequently, on September 24, 1993, the district court granted motions to dismiss for lack of federal subject matter jurisdiction. (R.56; Pet. A. 13a) In reaching its decision, the district court concluded that indirect sources of air emissions, such as parking lots, are not required to obtain a permit under Part D of the Clean Air Act and that stormwater discharges to groundwater are not subject to regulation under the Clean Water Act. *Id.*

The Village appealed to the United States Court of Appeals for the Seventh Circuit. (R.58) On February 15, 1994, the day of oral argument before the Seventh Circuit Court of Appeals, the EPA attempted to re-enter the case as an *amicus*. (Pet. A. 23a) The primary reason given for the EPA's eleventh hour appearance was that the EPA could not state its position on regulation of groundwater discharges until the Clinton Administration had finalized its position on Congressional Clean Water Act initiatives and the Administration had not done so until February 1, 1994. (Pet. A. 26a) The Seventh Circuit Court of Appeals refused to accept or file the EPA's *amicus curiae* brief. (Pet. A. 22a)

On May 18, 1994, the United States Court of Appeals for the Seventh Circuit entered its decision affirming the district court. (Pet. A. 11a)

Relief Pending Appeal filed with the Seventh Circuit Court of Appeals.

The Development of the Target Facility

The Target Center occupies 25 acres of a 99-acre site and provides state-of-the-art warehousing and distribution services for 37 Target stores in Wisconsin, Illinois and Iowa. (R.30:422) The facility was built at a cost of $63 million and is now complete. (Resp. A. 11)

The Industrial Park District in which the Target Center is located was originally developed in 1989 based upon the reports and recommendations of the Southeast Wisconsin Regional Planning Commission ("SEWRPC"). (R.30:398) The site is located off State Highway 67, a four-lane highway, approximately one-quarter of a mile from Interstate Highway I-94, a heavily traveled major artery for the City of Milwaukee. (R.30:398) The Target Center is immediately adjacent to the existing Oconomowoc Corporate Center which contains several factories. (R.30:398)

Before construction of the facility commenced, Target obtained all necessary state and local permits and approvals. (Pet. A. 1a; R.30:422) These included a Conditional Use Permit from the City Plan Commission,[5] building permits from the city and state, an "indirect source" air permit for the parking lot from the Wisconsin Department of Natural Resources,[6] and a stormwater discharge authorization from the DNR. (R.30:422)

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[5] The Plan Commission approval was granted after a public hearing and two Plan Commission meetings. The review included traffic impacts, water quality impacts, geotechnical evaluations, building code reviews and documents submitted to the DNR for its permits. (R.30:426.)

[6] As part of the review of the air permit, the DNR prepared an extensive Environmental Assessment ("EA") under the Wisconsin Environmental Policy Act. (R.30:444-485) After review of

Target submitted a "Notice of Intent for Stormwater Discharges Associated With Construction Activities" to the DNR on April 9, 1993 because of the potential for discharges to groundwater. (R.30:498) Under state law, Wisconsin voluntarily chose to regulate the discharge of pollutants to groundwater resources. Wis. Stat. § 147.015(20) Significantly, no surface water discharges were at issue. (R.30:533)

The Notice of Intent included a detailed stormwater management report describing the stormwater management techniques which would be utilized during the construction of the distribution center. (R.30:499) This report also included detailed plans for a state-of-the-art stormwater retention and infiltration pond which would collect and treat stormwater runoff from the parking areas once the facility was completed. (R.30:528) On April 22, 1993, the DNR issued a letter to Target's general contractor expressly authorizing the stormwater discharges associated with the construction activities described in Target's Notice of Intent. (R.30:539)[7]

Target did not need to apply for a stormwater discharge permit for its operations until 180 days prior to the commencement of facility operations. Wis. Stat. § 147.025(2); (R.30:499) Subsequently, on February 11,

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written public comments and comments at public hearings held on April 8 and 12, 1993, the DNR concluded that the facility did not have a significant impact on the quality of the human environment and that therefore a full Environmental Impact Statement was not required. *Id.*

[7] The Construction Site Stormwater Discharge Authorization is attached to the Schueller Affidavit. (R.30:539)

1994, the DNR confirmed that Target did not require a stormwater discharge permit for operation of the facility once constructed. (Resp. A. 5) Once the facility was constructed and became operational, the DNR again confirmed that the Distribution Center was not required to obtain a discharge permit.[8] (Resp. A. 9)

SUMMARY OF THE ARGUMENT

This case does not warrant review by this Court for several reasons. First, the Village failed to provide adequate and timely notice under the citizen suit provisions of the Clean Water Act and Clean Air Act. Accordingly, this Court lacks subject matter jurisdiction to issue the requested writ of certiorari.

Second, the issues presented for review regarding the stormwater discharges from construction and operation

[8] On September 15, 1994, Attorney Charles R. Hammer of the DNR Bureau of Legal Services issued a letter opining that the Target Center was not required to obtain any permit whatsoever for the stormwater runoff discharges associated with operation of the facility. (Resp. A. 9) Although this letter is not part of the formal record on review, it can be considered by this Court as it is a fact with respect to the mootness of the Village's requested writ of certiorari. *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (It is appropriate to remind counsel that they have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation.); citing, *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975). As discussed fully in section II of this brief, the DNR's determination that its final rules do not require the Target Center to obtain a stormwater discharge permit makes the Petition for a Writ of Certiorari moot.

activities at the Target Center are now moot. With regard to construction activities, all construction has been completed on the Target Center. With regard to ongoing stormwater discharges associated with operational activities at the Target Center, it has been determined and confirmed by the DNR that the Target Center is not required to obtain any permit whatsoever regulating its discharge of stormwater.

Third, the issue presented for review has not been properly raised by the record. The issue which the Village has presented is based entirely upon dicta contained in the Seventh Circuit Court of Appeals' decision. Furthermore, the Village has wholly failed to make a good faith allegation regarding the discharge of pollutants to waters of the United States (i.e. surface water). Indeed, its own expert testified that the stormwater runoff is not expected to impact the surrounding surface waters. (R.49)

Finally, review by this Court is not warranted at this time because the issue presented for review has not been fully developed by the lower courts nor has it been resolved by EPA or Congress.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THERE IS NO SUBJECT MATTER JURISDICTION OVER THE VILLAGE'S CLEAN WATER ACT CLAIMS.

A. Compliance With The 60-Day Notice Requirement Is A Mandatory Jurisdictional Prerequisite To Citizen Suit Actions Under The Clean Water Act.

The Village asserted jurisdiction in the district court under the citizen's suit provisions of the Clean Water Act. 33 U.S.C. § 1365(a). However, a mandatory prerequisite of such an action is that a complainant give 60 days notice prior to filing its lawsuit. 33 U.S.C. § 1365(b); see, *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), citing *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987).

The 60-day notice requirement, which is common to citizen suit provisions under the Clean Water Act (33 U.S.C. § 1365), the Clean Air Act (42 U.S.C. § 7604) and the Resource Conservation and Recovery Act (42 U.S.C. § 6972), serves two functions:

> First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Hallstrom, 493 U.S. at 29, citing *Gwaltney of Smithfield*, 484 U.S. at 60.

This Court has repeatedly emphasized the importance of complying with this jurisdictional prerequisite. In *Hallstrom*, which involved an analogous notice provision under the Resource Conservation and Recovery Act (42 U.S.C. § 6972(c)), this Court held that 60-day notice requirements are "mandatory conditions precedent to commencing suit under the RCRA citizen suit provision." 493 U.S. at 29.

This Court's holding in *Hallstrom* interpreting the Resource Conservation and Recovery Act citizen suit provisions has been applied to Clean Water Act citizen suit claims. *National Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991) (holding that "the 60-day notice requirement of 33 U.S.C. § 1365(b) is a mandatory condition precedent to the filing of a citizen suit under the Clean Water Act."); *Citizens for Better Environment-California v. Union Oil Co. of California, et al.*, ___ F. Supp. ___ 1994 WL 475591 (N.D. Cal. 1994).

Due to the importance of the notice requirements of citizen suit provisions, courts have held that failure to provide proper notice will result in dismissal of the entire citizen suit for lack of subject matter jurisdiction. *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 121 (1st Cir. 1976); *Protect Our Eagles' Trees v. Lawrence*, 715 F. Supp. 996, 998 (D. Kan. 1989); *Citizens For A Better Environment-California*, WL 475591; *Tannenbaum v. Jamison*, ___ F. Supp. ___, 1994 WL 247120 (N.D. Ill. 1994); *United States v. Princeton Gamma-Tech, Inc., et al.*, ___ F.3d ___, 1994 WL 394696 (3rd Cir. 1994); *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Assoc.*, 847 F. Supp. 380, 386 (E.D. Va. 1994); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927

(1976). Because the notice requirement is deemed to be jurisdictional in nature, the Village's utter failure to meet this requirement deprives this Court of jurisdiction to issue the writ of certiorari. This Court will not grant review where jurisdiction is not present. *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963); *Gorman v. Washington University*, 316 U.S. 98, 100 (1942).

B. The Village Failed To Comply With The 60-Day Notice Requirement.

Here, the Village admits it failed to give a 60-day notice. (Petition 7) Moreover, the Village does not attempt to claim that its action was brought under 33 U.S.C. §§ 1316 or 1317(a), which are exempt from the notice requirement. Instead, the Village argues that it was not required to comply with the 60-day notice requirement under the Clean Water Act because it also alleged Clean Air Act claims which did not require advance notice. *Id.* Specifically, the Village alleges because "the suit was, in part, premised upon 42 U.S.C. § 7604(a)(3)" of the Clean Air Act, it did not have to comply with the 60-day notice under 33 U.S.C. § 1365. *Id.*

Even if one were to accept the hybrid jurisdiction "premise" the Village asserts under *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2nd Cir. 1991), rev'd in part on other grounds, ___ U.S. ___, 112 S. Ct. 2638 (1992), there is a fundamental flaw in the Village's argument.[9]

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[9] The hybrid jurisdiction argument is based entirely on two cases *Dague* and *Zands v. Nelson*, 779 F. Supp. 1254, 1260-61 (S.D. Cal. 1991) which relies on *Dague*. Both cases present citizen suit

The Court of Appeals in this case held that Clean Air Act jurisdiction under 42 U.S.C. § 7604(a)(3) was "impossible":

> But to use § 7604(a)(3) the Village had to show that 'part D of subchapter I of this Chapter' requires a major-facility permit, *and it is impossible to see how this could be so.* . . . '[P]art D of subchapter I' does not require Dayton Hudson to obtain a permit; any such requirement must come from Wisconsin law and therefore *cannot* serve as a foundation for suit under § 7604(a)(3).' (emphasis added)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964 (7th Cir. 1994). (Pet. A. 4a). The Village has not petitioned for review of this aspect of the Seventh Circuit Court of Appeals' decision. (Petition i)

In the absence of a valid Clean Air Act claim under 42 U.S.C. § 7604(a)(3), there is no basis for excusing compliance with the 60-day notice requirement under the Clean Water Act. Nor should there be. If a party could avoid the 60-day notice requirement simply by making a groundless or "impossible" allegation that some exception applies, then the 60-day notice requirement would be effectively removed from the statutes of all major environmental laws.

Even the Court in *Dague* acknowledged that dismissal of a claim requiring 60 days notice is appropriate

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claims under the Resource Conservation and Recovery Act. There are no reported cases which apply this theory to hybrid claims under the Clean Air Act and Clean Water Act.

in the absence of a valid underlying claim which is not subject to an advance notice requirement:

> It [the City] also argues that if plaintiffs could circumvent the delay requirements by simply asserting a subchapter III claim, whether or not such a claim has merit, the congressional policy for delay would be effectively nullified.
>
> * * *
>
> Of course, if a plaintiff should allege frivolous subchapter III claims, he would not only be subject to Rule 11 sanctions, but his claims could also be dismissed early in the litigation process, and *the court, by stay or dismissal, could require full observances of the delay period.* (Emphasis added).

Dague, 935 F.2d at 1351-52.

Here, although not subject to Rule 11, the Seventh Circuit Court of Appeals has dismissed the Village's wholly meritless Clean Air Act claims. There is no independent basis for federal jurisdiction or to allow the Clean Water Act claims asserted in this action to proceed in the absence of a proper 60-day notice. In the absence of subject matter jurisdiction, this court has no basis to accept the petition. *Gotthilf*, 375 U.S. at 80; *Gorman*, 316 U.S. at 100.

II. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THE ISSUES ARE MOOT.

Under the 1987 Amendments to the Clean Water Act, stormwater discharges "associated with industrial activities" are subject to the discharge permit program. 33

U.S.C. § 1342(p). Industrial activities are defined by reference to the Standard Industrial Classification (SIC) Code published by the Office of Management and Budget. 40 C.F.R. § 122.26(a)(1)(ii) and (b)(14). Construction sites affecting areas greater than 5 acres are included as an industrial activity even if the facility when completed is not considered an industrial activity. *Id.*

The Village alleges that Target needed a water discharge permit for two types of stormwater discharges to groundwater. Specifically, the Village alleges Target needed a discharge permit for stormwater discharges associated with the construction of the Target Center and another permit for discharges associated with operation of the Target Center. Both of these issues are now moot.

A. Issues Associated With Stormwater Discharges From Construction Are Moot Because Construction Is Completed.

Construction of the Target facility began on June 6, 1994 and has now been completed. (Resp. A. 11)[10] Thus, even if stormwater discharges from construction activities were covered by the Clean Water Act, there are no continuing stormwater discharges from construction activities at the Target Center. It is a well established principle that a Clean Water Act citizen suit action cannot

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[10] The Beglin Affidavit is not part of the record on review. However, because the completion of the Target Center gives rise to the issue of mootness, it is proper for this Court to consider such factual evidence. *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); citing, *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975).

be brought for "past violations." *Gwaltney of Smithfield*, 484 U.S. at 64. Accordingly, this issue is moot.

While the claim is moot, it should be noted that Target fully complied with the DNR's requirements for control of stormwater discharges from construction sites.[11] In accordance with the Wisconsin stormwater program, Target submitted to the DNR a Notice of Intent to Discharge Stormwater ("NOI") along with a detailed construction site erosion plan on or about April 9, 1993. (R.30:518) On April 28, 1993, Target's general contractor, Witcher Construction Company, received notice from the DNR that stormwater was authorized to be discharged from the Target Center construction site. (R.30:539)

B. Issues Associated With Stormwater Discharges From Operational Activities Are Moot Under DNR Rules.

Under the Clean Water Act, states are required to develop and implement their own discharge permitting programs. 33 U.S.C. § 1342(b). Once a state's program is approved by EPA, that state is delegated **sole** authority to authorize discharges. *Id.* Wisconsin has been delegated authority by the EPA to implement and enforce its own discharge permit program pursuant to 33 U.S.C. § 1342.

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[11] Although under no federal requirement to do so, the State of Wisconsin voluntarily chose to regulate and permit the discharge of stormwater runoff to groundwater resources. Indeed, Wisconsin requires permits for the "discharge of any pollutant into *waters of the state.*" Wis. Stat. § 147.02(1) (emphasis added). The term "waters of the state" is defined to include both "surface water" and "groundwater." Wis. Stat. § 147.015(20).

(R.30:497; Resp. A. 14) That delegation has been neither suspended nor revoked by the EPA. *Id.*

In accordance with this delegation, the DNR began to develop formal administrative rules to implement the storm water permit program.[12] These rules, now contained in Wis. Admin. Code ch. NR 216, were adopted by the Wisconsin Natural Resources Board at its June 1994 Board meeting, have completed legislative review and are now final. (Resp. A. 10)

In accordance with federal mandates, NR 216 only regulates stormwater discharges from facilities with specific SIC codes. 40 C.F.R. § 122.26(a)(1)(ii) and (b)(14); Wis. Admin. Code § NR 216.21. The Target Center is classified as SIC Code 5311 (Resp. A. 3) which does not require a permit under the DNR's final rules. See, Wis. Admin. Code § NR 216.21. This was confirmed by the DNR in a letter dated February 11, 1994 from DNR Staff Attorney Charles Hammer while the rules were in draft form. (Resp. A. 5) Attorney Hammer issued a subsequent opinion after NR 216 was finalized which confirmed that the Target Center, being classified as SIC Code 5311, was not

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[12] Prior to the finalization of those rules, the DNR administered the program informally. (R.30:497; Resp. A. 16) The DNR required that any person who anticipated commencing a discharge submit a Notice of Intent ("NOI"). *Id.* Upon receiving the NOI, the DNR determined whether the applicants discharging activities were authorized. *Id.* The DNR then sent a letter confirming receipt of the NOI application and authorizing stormwater to be discharged. *Id.* Target, along with over 4,000 other entities in Wisconsin have followed this process and have received authorization to discharge stormwater from their respective construction sites. *Id.*

required to obtain any stormwater discharge permit for its facility. (Resp. A. 9) Thus, even if stormwater discharges to groundwater were covered under the Clean Water Act, Target does not require a permit. Since a remand would accomplish nothing, this issue is moot.

The Village's real complaint appears to be that the stormwater permit program was improperly delegated to Wisconsin or is being improperly administered. Under the terms of the Clean Water Act, the Village's recourse for alleged deficiencies in Wisconsin's delegated stormwater program is to seek to have the EPA Administrator withdraw Wisconsin's stormwater authorization or challenge the recently promulgated rules. 33 U.S.C. § 1342(c)(3). The Village has not sought this remedy. Indeed, although the Village named EPA in its original Complaint, the Village voluntarily dismissed EPA on August 26, 1993. (R.36)

III. THE ISSUE PRESENTED FOR REVIEW IS NOT PROPERLY RAISED BY THIS RECORD.

A. The Issue Presented For Review By The Village Is Dicta.

As discussed in section I of this brief, the Village failed to comply with the mandatory jurisdictional 60-day notice requirement of the Clean Water Act. In an effort to evade the 60-day notice requirement, the Village invoked 42 U.S.C. § 7604(a)(3) which is not subject to an advance notice requirement.

It was the Village's failure to meet the 60-day notice requirement that resulted in the Seventh Circuit's affirming the dismissal of their complaint. See, *Village of Oconomowoc Lake*, 24 F.2d at 963. Indeed, the Seventh Circuit severely criticized the Village's attempts to avoid the 60-day notice requirement and wrote:

> Why plaintiffs are unwilling to wait even 60 days – when an effort to jump the queue may lead to outright dismissal of the case under *Hallstrom* – eludes us. The Village filed suit only three days after giving notice. To justify this expedition, it invoked 42 U.S.C. § 7604(a)(3), which is not subject to the 60-day rule. Although this enabled it to sue 57 days sooner than it could have done had it used § 7604(a)(1) as the foundation of the suit, the strategy does little besides illustrate the adage that haste makes waste. (This saying predates the Clean Air Act and shows that not all waste is within federal jurisdiction.)

Id.

The Village ignores this portion of the Seventh Circuit opinion and instead attempts to fashion an issue based upon the Seventh Circuit's dicta concerning regulation of groundwater discharges under the Clean Water Act. However, the Seventh Circuit's decision affirming dismissal stands on its own without need to consider whether groundwater discharges are subject to regulation under the Clean Water Act.

Accordingly, the portion of the Seventh Circuit opinion addressing groundwater is mere dicta and is not appropriate for review by this Court. See, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959); *Belcher v. Stengel*,

429 U.S. 118 (1976) (A writ of certiorari is not necessary if the judgment below was clearly correct on another ground.); *Smith v. Butler*, 366 U.S. 161 (1961) ("After full argument and due consideration, it became manifest that the course of litigation and the decisions in the [other] courts did not turn on the issue on the basis of which certiorari was granted"); *Newsom v. Smyth*, 365 U.S 604, 604-605 (1961) (Certiorari is not proper if it may become evident that "the record does not adequately establish that the [court below] found or was required to find that there was presented to it the federal claim on which the case was brought [to the Court].")

Notwithstanding the Village's attempt to characterize the question presented for review as whether Clean Water Act jurisdiction extends to groundwater discharges, that aspect of the Seventh Circuit's decision was dicta. The basis of the Seventh Circuit opinion was simple. The Village failed to meet the express 60-day notice requirement.

B. The Village Has Not Made A Good Faith Allegation Regarding The Discharge Of Pollutants To Waters of the United States.

When a defendant claims that jurisdiction is not present, the obligation is on the plaintiff to demonstrate to the court through actual proof that jurisdiction is present. *Western Transp. Co. v. Couzens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989). Furthermore, the plaintiff's allegation of jurisdiction must be made in good faith. *Gwaltney*, 484

U.S. at 64; *Public Interest Research Group, Inc. v. ELF Atochem North America, Inc.*, 817 F. Supp. 1164, 1174 (D.N.J. 1993). Here, the record before the district court unequivocally demonstrates that the Village's allegations have not been made in good faith.

The Clean Water Act only regulates the discharge of pollutants to the waters of the United States (i.e., surface waters). 33 U.S.C. § 1311(a). Even if this Court were to accept the Village's novel argument that the Clean Water Act can regulate discharges to groundwater if it is hydrologically connected to surface water, the Village must still make a good faith allegation that the Target Center will discharge pollutants in such a manner. It has not done so.

The Village made a general allegation that stormwater discharges associated with the Target Center contain pollutants that will be "expressed and discharged" into waters of the United States. However, those allegations are wholly unsubstantiated and have been expressly refuted by the Village's own expert.

Supplement No. 1 to the Storm Water Management Report submitted by Target to the DNR indicated that stormwater runoff from the facility "will be treated, as needed, **to remove contaminants** and then infiltrated to recharge the groundwater." (R.30:533) (emphasis added) As stated, the retention pond is designed to remove contaminants and pollutants prior to the water being discharged from the site. Since pollutants will be removed, pollutants will not be conveyed by groundwater into waters of the United States as alleged in the Complaint.

Even more compelling is the Village's own expert, Dr. Frank Jones, who testified that the Village's allegation

suggesting that pollutants will be "expressed and discharged" into waters of the United States is just not true. Indeed, Dr. Jones admitted at his deposition on September 7, 1993, that no discharges will occur to surface water:

Q I invite your attention to Exhibit 45, Dr. Jones. Is that a document that you authored as evidenced by your name at the top of the document?

A Yes, it is.

Q And what was the purpose of authoring the document?

A It was to provide an information summary sheet on some of the items that I had investigated or had investigated by others, or had investigated by other individuals within Geraghty & Miller.

Q Was one of the purposes to do a presentation at a town meeting of the Town of Summit which took place on August 11th, 1993?

A Well, this was prepared before that, but I did present it at the town meeting on August 11th.

Q Why did you appear at a town meeting on August the 11th?

A I was requested to.

Q On Page 2 of Exhibit 45 you state, "Even if the groundwater is impacted **it is not expected that the contaminants in the groundwater will impact the surrounding lakes and rivers because the primary contaminants of concern would be held to the soils or diluted before reaching the surface waters,"** is that your opinion?

A Yes.

Jones Dep. Tr. 163-64 (emphasis added) (R.49)

Thus, even if discharges to groundwater hydrologically connected to surface water are covered by the Clean Water Act, the Village's Complaint should still be dismissed. The record clearly indicates that there will be no direct or indirect discharge of pollutants into waters of the United States. Indeed, the Village's own expert has already testified that the Village's allegations to the contrary are just not true. Accordingly, the issue presented for review is not properly raised by this record.

Finally, because the case was dismissed before a complete factual record could be developed, there was no opportunity for the Respondents to introduce evidence to the district court concerning the effects of expanded federal Clean Water Act jurisdiction. If any point source discharge to groundwater hydrologically connected to surface water was covered by the Clean Water Act, nearly every septic tank, sprinkler system and drainage ditch would require a permit. Problems associated with such a judicial expansion of the Clean Water Act were raised by the Seventh Circuit in the concurring opinion and are currently being debated by Congress. See, *Village of Oconomowoc Lake*, 24 F.3d at 966. (Pet. A. 10a)

IV. REVIEW BY THIS COURT IS NOT WARRANTED AT THIS TIME.

A. The Issue Presented for Review Has Not Been Fully Developed By The Lower Courts.

The Village claims that the Seventh Circuit Court of Appeals' decision in this case is in conflict with "better reasoned authorities." (Petition 15) In fact, only three

reported cases have directly addressed the issue presented. In *Kelley v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985), the court concluded that "the unmistakably clear legislative history . . . demonstrate that Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority on groundwater contamination." The district court and Seventh Circuit Court of Appeals in this case both relied on *Kelley*.

The district court in *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) reached a contrary result, however, that case is now on appeal. (Pet. A. 83a) Finally, in *McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431 (E.D. Cal. 1989), the court, on remand, allowed plaintiffs to submit proof on whether groundwater was hydrologically connected to surface water and whether there was a discharge of pollutants. That case however involved alleged seepage from hazardous waste disposal pits to a nearby surface water.

Other cases, to the extent they have addressed the issue at all, tend to support the Seventh Circuit Court of Appeals' opinion in this case. In *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977), the Fifth Circuit reviewed the Clean Water Act legislative history and concluded in the context of isolated groundwater that, "As we read these materials, the House, like the Senate, through the bill would leave control of groundwater pollution exclusively to the states."

In *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422-23 (7th Cir. 1990), the Seventh Circuit concluded that a discharge through an injection well "might be within the scope of the Act" but reserved judgment. The Seventh Circuit has

now addressed the issue by the opinion in this case. Moreover, the discharges addressed in *Inland Steel* were discharges through injection wells which, unlike storm-water infiltration, are expressly regulated under the Clean Water Act. See, 33 U.S.C. § 1342(b)(1)(D).

Thus, this is hardly a situation where the lower courts have developed the law and defined a conflict warranting the attention of this Court. This Court has frequently noted that a conflict should be allowed to ripen before being given consideration. In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950), Justice Frankfurter noted:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

The time for adjudication of this issue has not yet come.

B. The Issue Presented Has Not Been Resolved By EPA And Is Now Being Reviewed By Congress.

Although the Village would have the Court believe that EPA has had a clearly articulated longstanding position supporting the regulation of groundwater, that is simply not true. In fact, EPA's position in this case could not even be articulated to the Seventh Circuit Court of Appeals until February 15, 1994 because the Clinton Administration's position on the Clean Water Act reauthorization was not known until February 1, 1994.[13] (Pet. A. 26a).

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[13] This uncertainty is reflected in the fact that EPA and other federal agencies have often taken positions contrary to the

Whether the Clean Water Act should be changed to include groundwater within its scope is one of the issues involved in the Clean Water Act reauthorization debate in Congress. The 1994 Clean Water Act "rewrite bill," HR 3948, would specifically amend the Clean Water Act to include certain discharges to groundwater. Section 404 of the bill provides:

> Sec. 404. DISCHARGES INTO GROUND WATER.
>
> Section 402 (33 U.S.C. 1342) is amended by adding at the end the following:
>
> '(r) Discharges into Ground Water.-
>
> '(1) General Rule.-For the purposes of this section, any discharge of a pollutant into the ground or ground waters shall be treated as a discharge of a pollutant into the navigable waters if-
>
> '(A) There is a reasonably foreseeable and demonstrable direct hydrologic connection between the ground waters and surface waters in the proximity of the discharge;
>
> '(B) A greater than de minimis quantity of the pollutant reasonably and demonstrably is able to reach such surface waters; and

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one now claimed by the Village. For example, in *Inland Steel Co.*, 901 F.2d 1419 (7th Cir. 1990), EPA took the position that the injection of wastes into wells was not governed by the Clean Water Act but rather by the Resource Conservation and Recovery Act. In *Kelley*, 618 F. Supp. at 1103 and *MESS*, 763 F. Supp. at 431, other government agencies vigorously argued that discharges to groundwater were not covered by the Clean Water Act.

> '(C) No other federal law directly addresses the activity resulting in the discharge.'

If this issue is to be revisited, it should be revisited by Congress, not by this Court.

Absent such a change, the existing language and legislative history of the Clean Water Act indicates that discharges to groundwater are not within the scope of the Clean Water Act. Several attempts were made to include discharges to groundwater in the 1972 Clean Water Act Amendments but all such attempts were directly rejected by both the House and Senate. See, *Exxon Corp.*, 554 F.2d at 1328. (The court provides a detailed review of the legislative history associated with the Clean Water Act and concludes that it is "inconceivable" that Congress intended to grant EPA authority over groundwater discharges.)

If Congress now wishes to revisit this issue, it can do so. This Court should not, however, judicially expand the Clean Water Act in the manner suggested by the Village which would extend federal jurisdiction to nearly every septic tank, parking lot and lawn sprinkler system.

CONCLUSION

Despite the Village's attempt to frame the question presented for review as involving a matter of federal importance, the simple fact is that the Village failed to meet the 60-day notice requirement of the Clean Water Act. Having failed to meet the notice requirement, this Court lacks subject matter jurisdiction over the case and

is precluded from issuing the requested writ. Furthermore, due to the Village's failure to meet the notice requirement, its petition is improperly seeking review of dicta contained in the Seventh Circuit Court of Appeals' opinion.

Even assuming that the question presented by the Village has merit, this case does not warrant review because the issues have become moot and there is no impact on surface waters presented by the facts of this case. Accordingly, the Petitioner's Writ for Certiorari must be denied.

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[Letterhead Address Omitted in Printing]

February 4, 1994

Charles R. Hammer, Esq.
Bureau of Legal Services
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: WPDES Storm Water Discharge Permit
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Hammer:

As we agreed in our recent discussions, I am writing to you to request the Department's written determination that the Target Midwest Distribution Center presently under construction at Oconomowoc, Wisconsin will not be required to apply for or obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit for the discharge of storm water runoff from the facility when it becomes operational. As you are aware, Target had earlier provided notice to the Department of the proposed construction activity prior to the commencement of construction.

The distribution center facility is to be used by Target Stores for the receipt and offloading of merchandise from suppliers, the storage of that merchandise and the loading and shipment of that merchandise to Target retail

stores in the region. Incorporated into the design of the facility are roof drain collection means for transporting storm water to an on-site surface impoundment. The surface impoundment also receives storm water flow from the parking lot areas of the facility following the treatment of that storm water runoff in a sand filtration mechanism. The storm water accumulated in the surface impoundment then exfiltrates to the groundwater in the area.

We understand that the regulations for the implementation of a storm water discharge permitting program in Wisconsin are presently under development. We understand also that the Wisconsin regulations will be based upon the federal storm water discharge regulations. Under the federal regulations for the permitting of storm water discharges, permits are required for facilities having a "storm water discharge associated with industrial activity" as that term is defined at 40 C.F.R. §122.26(b)(14) (1992).

Numerous categories of industries are identified in the definition of a "storm water discharge associated with industrial activity" which are required to apply for and obtain a storm water discharge permit. Facilities in industry categories having certain Standard Industrial Classification ("SIC") codes, by definition, have storm water discharges associated with industrial activity and are required to apply for and obtain a storm water discharge permit. Facilities in industry categories with certain other SIC codes are required to apply for and obtain a discharge permit only *if* the storm water discharge is from an area of the facility or activity where material handling equipment or activities, raw materials, intermediate

products, final products, waste materials, by-products, or industrial machinery are exposed to storm water. Facilities in industry categories not identified by the SIC codes are not, generally, required to obtain a storm water discharge permit.

The SIC code from the 1987 *Standard Industrial Classification Manual* applicable to the Target Midwest Distribution Center is Industry No. 5311 for "Department Stores" in Major Group 52 of Division G, Retail Trade in the SIC system. This determination is based upon the description of the retail trade division provided in the *Standard Industrial Classification Manual* (1987) at pages 313-314 which states that "[C]hain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the activity carried on by such retail stores".

Using the promulgated federal regulations and the *Standard Industrial Classification Manual* (1987) as guides, we conclude that the requirement to apply for and obtain a storm water discharge permit is not applicable to the Target Midwest Distribution Center. The Target Midwest Distribution Center does not meet the criteria of any of the subparagraphs (i)-(xi) of 40 C.F.R. 122.26(14) (1992) as having a storm water discharge associated with industrial activity. Subparagraphs (i) and (iii) – (v) of 40 C.F.R. 122.26(a)(1) (1992) are also not applicable to the Target facility. Therefore, the Target Midwest Distribution Center should not be required to apply for and obtain a discharge permit under the WPDES program in Wisconsin for the discharge of storm water runoff at the facility.

As we agreed, you will review the information provided in this letter and provide a written determination concerning the non-applicability of the WPDES storm water discharge program to the Target Midwest Distribution Center. If you have any questions regarding the information provided, need additional information or if you wish to discuss the Department's proposed determination, please contact me as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

MICHAEL, BEST & FRIEDRICH

/s/ Donald F. Kiesling
Donald F. Kiesling

DFK/mam/tar

cc: Pat Crane – Target
Dean Wenger – Target
Jeff Appelquist – Target
David Luick – Target

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES

(LOG0)
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February 11, 1994 IN REPLY REFER TO: 8300

Mr. Donald F. Kiesling
Attorney at Law
Michael Best & Friedrich
100 East Wisconsin Avenue
Milwaukee, WI 53202-4108

SUBJECT: WPDES Stormwater Discharge Permit,
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Kiesling:

I am writing in response to your letter to me of February 2, 1994 regarding the above-referenced matter. I believe your letter accurately reflects the understanding of the Department regarding the applicability to the Target Midwest Distribution Center of the Department's proposed storm water administrative rules, subject to the following qualifiers.

First, as you correctly state in your letter, the administrative rules to implement the storm water discharge permitting program are still under development. The

Department will ask the Natural Resources Board to authorize hearings on the draft rules at its February monthly meeting. Consequently, any judgment rendered by us on the content of the administrative rules is one made based on a provision that can conceivably change by virtue of public input. I should note, however, that we do intend to follow closely the federal listing of industry types that require regulation. Consequently it is unlikely that an industry presently *not* on the list requiring a permit would be added through the hearing process.

Second, there will be thousands of facilities which will ultimately be subject to the administrative rules and anticipated general permits. The Department has not and cannot make individual judgments regarding the appropriate SIC code for all such facilities. We must rely on the facility owners to properly identify which SIC codes apply to their facilities. Nevertheless, presuming that the Target Midwest Distribution Center is appropriately classified as Industry No. 5311, we would agree that it does not require a permit under our draft administrative code as presently written.

Sincerely,

/s/ Charles R. Hammer
Charles R. Hammer

cc: Michael Witt WW/2
John Greene-DOJ

Michael Best
& Friedrich
Attorneys at Law

[Letterhead Address Omitted in Printing]

September 14, 1994

Charles R. Hammer, Esq.
Bureau of Legal Services
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707

Re: WPDES Storm Water Discharge Permit
Target Midwest Distribution Center
Oconomowoc, Wisconsin

Dear Mr. Hammer:

On February 2, 1994, I submitted a letter to you providing information about the Target Midwest Distribution Center at Oconomowoc, Wisconsin and requesting the Department's written determination that that facility was not required to apply for or obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit for discharge of stormwater run-off from the facility once it became operational. In response to my request, I received a letter from you dated February 11, 1994, in which you agree with my conclusion that no WPDES permit would be required for the facility. However, in your letter you qualified your opinion with regard to the fact that the administrative rules to implement the stormwater discharge permitting program (Wis. Admin. Code Ch. NR 216) were still under development.

Since receiving your February 11, 1994 letter, the Chapter NR 216 administrative rules were approved by the Natural Resources Board at its June, 1994 meeting and were approved by the Wisconsin Legislature. As a consequence of these developments, I am writing again to request the Department's written determination that the Target Midwest Distribution Center is not required to apply for or obtain a WPDES permit for the discharge of stormwater run-off from its facility.

If you have any questions regarding the information provided, need additional information, or if you wish to discuss the Department's proposed determination, please contact me as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

MICHAEL, BEST & FRIEDRICH

/s/ Donald F. Kiesling
Donald F. Kiesling

DFK/mam

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES

(LOGO)
WISCONSIN
DEPT. OF NATURAL
RESOURCES
George E. Meyer, Secretary
Charles R. Hammer,
Attorney at Law

101 South Webster Street
Box 7921
Madison, Wisconsin 53707
DIRECT LINE 608-266-0911
TELEFAX 608-267-3579
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September 15, 1994 IN REPLY REFER TO: 8300

Mr. Donald F. Kiesling
Attorney at Law
Michael Best & Friedrich
100 East Wisconsin Avenue
Milwaukee, WI 53202-4108

SUBJECT: WPDES Stormwater Discharge Permit, Target Distribution Center

Dear Mr. Kiesling:

On September 14, 1994 you wrote to me regarding a matter we had discussed in writing in February, 1994. Your question in February was whether the Target Midwest Distribution Center located in Oconomowoc, Wisconsin, would need to have a stormwater discharge permit for its operation. This is a separate issue from whether there should have been either state or federal permit coverage for stormwater discharges associated with construction of the facility.

My response, copy attached, is self-explanatory. Since that time ch. NR 216, Wis. Adm. Code, the administrative rule regulating stormwater discharges referenced in my

February 11, 1994 letter, has received final approval from this agency's governing body, the Wisconsin Natural Resources Board. The rules have also cleared, without amendment, the legislative review process provided for in ch. 227, Wis. Stats. The rules will become effective upon publication on November 1, 1994. No changes will occur between now and November 1. The time between clearance of legislative review and the date of effectiveness is associated with printing and publication needs.

While the public participation process referenced in my letter of February 11, did result in changes to the content of ch. NR 216, SIC Code No. 5311 was not added as an industrial sector requiring stormwater permit coverage for facility operation. Consequently, subject to one qualification, if the Target Midwest Distribution Center is appropriately classified under that Code number, no stormwater discharge permit need be applied for nor obtained. The one qualification is that § NR 216.21(2)(b)11., Wis. Adm. Code, does provide that this Department may determine any facility not otherwise subject to stormwater regulation to be a significant contributor of pollutants, thus requiring coverage by a stormwater discharge permit. The Department has made no such determination regarding the Target Midwest Distribution Center.

Sincerely,

/s/ Charles R. Hammer
Charles R. Hammer

No. 94-304

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

AFFIDAVIT OF MICHAEL BEGLIN

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

MICHAEL BEGLIN, being first duly sworn according to law, deposes and says:

1. I am employed by Target Stores, a Division of Dayton Hudson Corporation ("Target"), as the General Manager of the Target Midwest Regional Distribution Center at Oconomowoc, Wisconsin ("Distribution Center").

2. Construction of the Distribution Center was completed on April 6, 1994, when an occupancy permit was issued by the City of Oconomowoc. Landscaping has also been completed.

3. The formal "Grand Opening" of the Distribution Center occurred on July 14, 1994.

4. Approximately 370 people are presently employed at the Distribution Center. The first shipments into the facility began on June 6, 1994 and the first shipments out of the facility began on July 17, 1994.

/s/ Michael Beglin
Michael Beglin

Subscribed and sworn to before me
this 15th day of September, 1994.

_____

Notary Public, State of Wisconsin
My Commission is/expires: _____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and TOWN OF SUMMIT,

Plaintiffs,

v.

Case No. 93-C-0797

DAYTON HUDSON CORPORATION, GEORGE E. MEYER, Secretary, and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES, VALDUS V. ADAMKUS, Regional Administrator, CAROL BROWNER, Administrator, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

AFFIDAVIT OF JAY HOCHMUTH

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

JAY HOCHMUTH, being first duly sworn on oath, deposes and says:

1. I am the Deputy Administrator of the Division for Environmental Quality of the Wisconsin Department of Natural Resources ("Division").

2. Among other things, I am a custodian of the records of the Division including the records of Bureau of Waste Water Management which is part of the Division.

3. Attached hereto and incorporated herein as Exhibit 1 are true and correct copies of the following records of the Division:

A. Memorandum of agreement between the State of Wisconsin Department of Natural Resources and United States Environmental Protection Agency, Region V dated December 17, 1973.

B. Letter to then Governor Patrick J. Lucey dated February 4, 1974, from then EPA Administrator Russell E. Train delegating federal authority to the State of Wisconsin to administer federal water pollution control programs in Wisconsin.

/s/ Jay Hochmuth
Jay Hochmuth

Subscribed and sworn to before
me this 17th day of September, 1994.

_____
Notary Public, State of Wisconsin.
My Commission is/expires: _____

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

VILLAGE OF OCONOMOWOC LAKE and TOWN OF SUMMIT,

Plaintiffs,

v.

Case No. 93-C-0797

DAYTON HUDSON CORPORATION, GEORGE E. MEYER, Secretary, and the WISCONSIN DEPARTMENT OF NATURAL RESOURCES, VALDUS V. ADAMKUS, Regional Administrator, CAROL BROWNER, Administrator, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

AFFIDAVIT OF MICHELLE SCHUELLER

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

MICHELLE SCHUELLER, being first duly sworn according to law, deposes and says:

1. I am a waste water specialist with the Wisconsin Department of Natural Resources ("DNR"), Bureau of Wastewater Management.

2. The DNR Bureau of Wastewater Management administers the State of Wisconsin's construction stormwater discharge permit program.

3. In 1976, Wisconsin was delegated authority by the United States Environmental Protection Agency ("U.S. EPA") to administer and implement a point source discharge elimination system permit program.

4. In addition to receiving authority to administer a point source discharge elimination system permit program, Wisconsin has been delegated authority to issue "general" Wisconsin Pollution Discharge Elimination System ("WPDES") discharge permits.

5. A "general" permit is essentially a set of standards that applies to a broad class of dischargers where environmental protection can be achieved through a set of general provisions that apply to all dischargers. The state currently has 15 general permits that apply to about 800 industrial facilities. DNR is in the process of implementing a general permit program for stormwater discharges. *See* DNR briefing memo dated November, 1992, which is distributed to general permit applicants. (Attached as Exhibit A.) EPA has been kept advised of, and concurred in, the Wisconsin method of handling permit applications while the state implements its program.

6. Under the stormwater permit program, sources need only submit a "Notice of Intent" application ("NOI"). *See*, "Wisconsin's DNR Stormwater Program" sheet dated May 12, 1993. (Attached as Exhibit B.) Upon receiving an NOI, the DNR will determine whether the applicant's discharging activities qualify for coverage

under the general permit. If the Department determines that the discharger's activities qualify for coverage under a general permit, the DNR will send written confirmation acknowledging receipt of the NOI and a letter indicating that the discharger will qualify for inclusion and regulation under a general permit.

To date DNR has sent out notifications to approximately 20,000 existing sources indicating they must submit NOI's to DNR. To date DNR has received over 4,000 NOI's for existing and new sources and have notified them that their application has been received.

7. Upon request by the applicant, the DNR will send a letter confirming receipt of the NOI application. This letter states that in the view of the Department, submittal of the NOI application satisfies the minimum requirements of the Clean Water Act at this time.

8. On April 9, 1993, the DNR received from Target Corporation a "Notice of Intent for Stormwater Discharge Associated with Construction Activities under a WPDES General Permit." A true and correct copy of the April 9, 1993, NOI received from Target Corporation is attached hereto as Exhibit C.

9. Along with an NOI, Target Corporation submitted to DNR a "Stormwater Management Report for Witcher Construction Company" describing the stormwater management techniques to be utilized at the Target Distribution Center. A true and correct copy of that report is attached as Exhibit D.

10. On April 22, 1993, the DNR issued a letter to Witcher Construction Company, a construction contractor

hired by Target Corporation to construct the Target Distribution Center. A true and correct copy of the April 22, 1993, letter is attached hereto as Exhibit E.

11. With its submittals, Target has done all that is required by DNR to apply for a construction stormwater permit.

12. To the best of my knowledge, with regard to the operational WPDES permit that will be required of the Target Distribution Center once the facility has been constructed, application for a permit need only be received 180 days prior to the facility's initial discharge. A permit application before such time is not required under Wisconsin law.

/s/ Michelle Schueller
Michelle Schueller

Subscribed and sworn to before
me this ___ day of September, 1994.

_____
Notary Public, State of Wisconsin.
My Commission is/expires: _____

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

(3)

No. 94-304

In The

Supreme Court of the United States

October Term, 1994

VILLAGE OF OCONOMOWOC LAKE,

Petitioner,

v.

DAYTON HUDSON CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF IN REPLY

WILLIAM S. ROUSH, JR.*
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REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Is Not Merely Dicta.

The Respondents, the City of Oconomowoc and Dayton Hudson Corp.,[1] argue that the holding of the Court of Appeals regarding the limited scope of the Clean Water Act is merely "dicta." To the contrary, the Seventh Circuit knows dicta when it reads it, having expounded at length on how to recognize dicta and why it occurs in *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). The decision of the Court of Appeals in this case satisfies none of the criteria for recognizing dicta established by the Seventh Circuit itself.

The Court of Appeals' pronouncement on the limited scope of the Clean Water Act was not an off-hand or ill-considered statement of illustration, or an aside, unnecessary to its holding. The Court of Appeals answered the precise question identified by the Respondents as the question to be answered by the Court of Appeals respecting the Petitioner's Clean Water Act Claim:

> (2) Does the federal Clean Water Act require a permit for the discharge of stormwater to groundwater?
>
> **Answered by the District Court: No.**

Joint Brief of the City of Oconomowoc and Target Stores, a Division of Dayton Hudson, "Statement of Issues," p. 6, Court of Appeals No. 93-3380 (December 23, 1993) (emphasis in original).

---

[1] The State Respondents, George Meyer and the Wisconsin Department of Natural Resources filed a waiver of their right to file a responsive brief. As used herein, "Respondents" refers only to the City of Oconomowoc and Dayton Hudson Corporation.

The Court of Appeals was not, however, uninformed of the "defective notice" argument now being made by the Respondents on the basis of *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989).[2] Although the Respondents did not identify any "defective notice" issue in their "Statement of Issues" in the Court of Appeals, they did brief and argue *exactly* the same point in the Court of Appeals as an alternative theory for affirming the decision of the trial Court.[3] The Court of Appeals simply chose not to accept, rely on or even discuss the Respondents' "defective notice" argument regarding the Clean Water Act claim. Instead, the Court of Appeals firmly and quite unequivocally construed the Clean Water Act and narrowly circumscribed its limits.

Perhaps, since the Respondents did not identify any "defective notice" issue in their "Statement of Issues" respecting the Clean Water Act, the Court of Appeals felt they had waived the issue or did not see fit to address issues that were not properly raised or identified by the Respondents. Perhaps, the Court of Appeals concluded that the decision in *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2nd Cir. 1991), was clearly correct, clearly applicable, and required no further elaboration or discussion. For whatever reason, the Court of Appeals' construction of the limited coverage of the Clean Water Act was not only essential to its disposition of the Petitioner's Clean Water Act claim, it was the *only* basis for the Court of Appeals' decision affirming the dismissal of the Clean Water Act claim. *Village of Oconomowoc Lake v. Dayton*

---

[2] *Brief of Respondents City of Oconomowoc and Target Stores, a Division of Dayton Hudson Corporation in Opposition*, pp. 9-13, hereafter cited to as "*Brief of Respondents.*"

[3] *See, e.g., Joint Brief of the City Oconomowoc and Target Stores, a Division of Dayton Hudson*, pp. 44-45, Court of Appeals No. 93-3380 (December 23, 1993).

Hudson Corp., 24 F.3d 962, 964-66 (7th Cir. 1994); [App. 6a-9a]. The holding was not mere dicta, as argued by the Respondents.

Unless one can reasonably conclude that the Petitioner and the courts subordinate to the Seventh Circuit Court of Appeals are free to completely disregard that portion of the decision relating to the Clean Water Act, the Court of Appeals' definitive construction of the Clean Water Act is not "dicta." Petitioner submits that no reasonable person could reach such a conclusion. Certainly, Respondents would be the first to scream "foul" if the Petitioner were to refile its Clean Water Act claim, even after giving a fresh notice and waiting sixty days.[4] Given the stern tenor of the Court of Appeals' decision and the daunting potential for being sanctioned for bringing a similar claim, it is unlikely that any other citizen would dare bring such a claim in the trial courts subordinate to the United States Court of Appeals for the Seventh Circuit and then dare to argue that the Court of Appeals' decision was merely "dicta."

The Petitioner has not mischaracterized the question presented by the decision of the Court of Appeals in this case. Rather, the Respondents' "dicta" argument is a poor substitute for the Respondents properly raising their defective notice theory in the Court of Appeals in the first instance, or in this Court by the filing of a cross-petition for a writ of certiorari in a timely fashion pursuant to Rule 12.3. Having failed to properly raise the issue before, the Respondents should not be allowed to raise the issue now, through specious argument.

---

[4] As suggested by the Court of Appeals, the Petitioner issued and served an amended notice of its intent to institute suit under 42 U.S.C. § 7604(a)(1) on May 20, 1994, which is why the Petitioner is not seeking review of the Court of Appeals' holding with respect to the Petitioner's Clean Air Act claim.

II. This Case Is Not "Moot" Under Any Circumstances.

The Respondents' mootness argument is meritless, but troubling. At the same time that Respondents criticize the Petitioner for fully informing the Court of the proceedings below and including documents in the appendix to the Petition that were filed with or issued by the Court of Appeals, *Brief of Respondents*, pp. ii-iii, the Respondents seek to introduce new affidavits and correspondence into the record. To make matters worse, Respondents then mischaracterize the new "facts" established by the recently prepared affidavits. Notwithstanding the new material inappropriately submitted for the first time in this Court, however, it is plain that this case is not moot.

A. Completion of Construction Does Not Preclude the Granting of Effective Relief.

Conceding that they never received the preconstruction storm water discharge permit required by the Clean Water Act, the Respondents first contend that their ability to construct the Target Distribution Center faster than the courts could adjudicate the Petitioner's citizen suit claim renders the case "moot" because the Respondents' Clean Water Act violations are now "wholly past" under *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), which concerned the subject matter jurisdiction of the trial court to entertain a citizen suit under 42 U.S.C. § 1365 based on the defendant's state of compliance at the time the complaint was filed.

It has been well established by this Court that the Respondents' burden of proving mootness is a heavy one, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This Court has also pointed out that a case is only moot when, "an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of*

Scientiology of California v. United States, ___ U.S. ___, 113 S.Ct. 447, 449 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). In this case it is still entirely possible for the courts to grant the Petitioner very effective relief, whether it be injunctive relief or civil penalties, if it prevails on the merits of its claims.

As the Court of Appeals for the Seventh Circuit has held in rejecting a mootness argument almost identical to that of Respondents:

> As a threshold matter, we do not agree with Fornell's suggestion that this court no longer has jurisdiction because construction of the facility has begun. . . . If plaintiffs and the attorney general were to succeed in showing that the permit had to be revoked or modified, we presumably could order that the facility be dismantled, altered or operated differently. [citations omitted] Thus, this appeal is not moot.

Van Abbema v. Fornell, 807 F.2d 633, 636-637 (7th Cir. 1986), citing *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) and *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). Since to this day the Respondents have never received the storm water permit that was necessary to authorize construction of the Target Distribution Center, it is still possible for the courts to grant the Petitioner any of the forms of injunctive relief identified in *Van Abbema*.

Even if the Respondents had applied for and received the proper permits or had otherwise been able to purge themselves of their Clean Water Act violations after the commencement of the action in the trial court, the potential award of civil penalties for the ongoing violations that were occurring and have continued to occur since the complaint was filed in this action would prevent this case from being moot. This was precisely the holding by the

Fourth Circuit Court of Appeals upon the remand of this Court's decision in *Gwaltney, supra,* after the Court of Appeals had concluded that the commencement of the underlying suit was premised upon a good faith allegation of an ongoing violation:

> In our view, the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance and even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 890 F.2d 690, 696 (4th Cir. 1989). The reasoning of the Fourth Circuit Court of Appeals was followed and expanded upon by the Eleventh Circuit in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1134-37 (11th Cir. 1990).

B. The Need For A Storm Water Operating Permit Has Never Been Determined.

The second prong of Respondents' mootness argument should be rejected because: (1) it is based on new affidavits and correspondence outside of the record; (2) the Respondents' representations regarding a determination by the State, that no operating permit is needed, is demonstrably false from the text of the correspondence itself; and (3) the basis for Respondents' new theory is Dayton Hudson's creative but unreasonable legal argument, that a 1.1 million square foot facility, with parking for over 700 semi-trailers, that is devoted exclusively to the receiving and shipping of goods via up to 444 semi-trucks per day, and at which nothing is ever sold to anyone, is really a retail "Department Store" rather than a warehouse associated with transportation. *See, e.g.,* 40 C.F.R. § 122.26(b)(14)(viii) and (xi).

It is fairly clear that the only people who have concluded anything about Dayton Hudson's need for an operating storm water permit are Dayton Hudson's lawyers. *Brief of Respondents,* App. 3. In response to Dayton Hudson's request for a written determination that no permit was required, a representative of the Wisconsin Department of Natural Resources wrote on February 11, 1994:

> *The Department has not and cannot make individual judgments regarding the appropriate SIC code for all such facilities. We must rely on the facility owners to properly identify which SIC codes apply to their facilities.* Nevertheless, presuming that the Target Midwest Distribution Center is appropriately classified a Industry No. 5311, we would agree that it does not required a permit under our draft administrative code as presently written.

Brief of Respondents, App. 6 (emphasis added). In response to Dayton Hudson's lawyers' renewed request on September 14, 1994,[5] for a written determination of the facility's exempt status, the same representative of the Wisconsin Department of Natural Resources wrote back on September 15, 1994:

> . . . SIC Code No. 5311 was not added as an industrial sector requiring stormwater permit coverage for facility operation. Consequently, subject to one qualification, *if the Target Midwest Distribution Center is appropriately classified under that number, no stormwater permit need be applied for or obtained.*

Brief of Respondents, App. 10 (emphasis added).

---

[5] The *Petition for Certiorari* was filed with this Court and served upon the Respondents by regular mail on August 16, 1994.

Contrary to Respondents' arguments, couched in representations of "fact" to this Court, the "fact" appearing from the face of the correspondence is that the Wisconsin Department of Natural Resources *refused* to make any determination on how to categorize Dayton Hudson's facility under the SIC codes, making any "determination" entirely dependent on Dayton Hudson's self-classification. *Cf. Brief of Respondents*, pp. 7, 16. The fact is, the Respondents concede that they have never applied for and have never received an operational storm water permit.

It is entirely inappropriate for the Respondents to ask this Court to engage in fact finding on the basis of new affidavits and contentious arguments that are not well founded in the record. *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157-58, n.16 (1970). Nor should the Court of Appeals' decision in this case evade the review it deserves based on Respondents' attempt to have this Court engage in fact finding, on the basis of snippets of disputed deposition testimony, when even the trial court in this case was unwilling to make factual determinations at the very early stage at which this case was dismissed. *Decision and Order*, pp. 3-4, n.2, 6-7, n.3 [App. 15a-16a, 18a-19a]. *Cf., Brief of Respondents*, pp. 20-21.

The question presented by the decision of the Court of appeals is purely a legal one, and it is extremely narrow. The issue that has been properly presented, regarding the proper scope of the Clean Water Act, should be reviewed by this Court. Trials and fact finding are for trial courts.

III. The Pendency Of Potential Legislation Is Not Material To The Issues In This Case.

As the Court of Appeals itself noted, negative legislative history is particularly unpersuasive in construing statutes. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); [App. 8a]. Speculation as to the import of legislative history "in the making" is even less persuasive as a reason to deny the requested writ in this case to review the decision of the Court of appeals. *Cf., Brief of Respondents*, pp. 24-26. If congress passes the legislation referred to by Respondents, and thereby ratifies U.S. EPA's authoritative interpretation of the Clean Water Act, the issue presented in this case will still remain with respect to the state of the law at the time this action was commended. If the legislation is not passed, it is likely due to the fact that the legislators felt it was not particularly necessary to expend the political energy to ratify U.S. EPA's construction of the Clean Water Act given this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In either case, the important reasons for granting the requested writ to review the Court of Appeals' decision will still remain.

Unless Congress enacts a statute, with retroactive effect, unequivocally stating that U.S. EPA is prohibited from regulating the "discharge of any pollutant" to waters of the United States that occur through shallow, hydrologically connected groundwaters, the construction of the scope of the Clean Water Act by U.S. EPA remains undisputed and most likely dispositive of the issue that has been properly presented by this case, according to this Court's decision in *Chevron*. It is immaterial whether Congress chooses to ratify U.S. EPA's construction of the Clean Water Act or continue to defer to U.S. EPA's interpretation. What is material is the fact that the Court of

Appeals did not defer to the agency's interpretation, as it should have done in this case.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the *Petition for a Writ of Certiorari*, the Petitioner urges this Court to issue the writ, review the Court of Appeals' decision, and reverse it.

Respectfully submitted,

WILLIAM S. ROUSH, JR.*
KATHERYN A. LONSDORF

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